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THE FAIR WEAR AND TEAR CLAUSE.

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For well over a century it has been the established practice of conveyancers to insert in leases, whenever such a clause has been desired by the parties, a proviso to the repairing covenant excepting fair or reasonable wear and tear. It is interesting to note that the fifth edition of *Woodfall on Landlord and Tenant*, dated 1819, omits any such proviso from its precedents, and the only clause of such a kind dealt with in the text is a covenant to deliver up at the end of the term all the trees standing in an orchard at the time of the demise, "reasonable use and wear only excepted". We read (p. 244) that this covenant is not broken by removing trees decayed and past bearing from a crowded part of the orchard. It is clear, however, that the clause has for a very long time been well known as a qualification of the repairing covenant. By 1838 it was so firmly established and so well known that it was said that everyone knew what it meant. In *Mantz* v. *Goring* (1838), 4 Bing. N. C. 451, Tindal, C.J., says: "The covenant is to keep the premises in good and tenantable repair, reasonable wear and tear excepted. Everyone knows what such a covenant means, and the tenant must fulfil it according to the nature of the premises: for it is established by *Stanley* v. *Towgood* (1836), 3 Scott 313; 3 Bing. N. C. 4, and other cases that the same nicety of repair is not exacted for an old building as for a new one." Accordingly the defendant in *Mantz* v. *Goring* was permitted to show generally in what state the premises were at the commencement of the term,

and whether they were new or old, for those facts were relevant to the question whether he had kept the premises demised to him in good and tenantable repair, reasonable wear and tear excepted; but it was not competent to him to show in matters of detail what was their condition when demised to him. Beyond this Tindal, C.J., does not in that case trouble to explain a matter which he evidently regarded as common knowledge. By the time of the ninth edition of *Woodfall* (1867) the fair wear and tear clause has established a place in one of the precedents, but there is no analysis of the meaning of the expression in the text.

The best indication of the way in which the clause was regarded a hundred years ago is to be found in a case in which the actual reported words of the Judge do not expressly mention the fair wear and tear proviso at all. In *Gutteridge* v. *Munyard* (1834), 7 C. & P. 129; 1 Moo. & R. 334, the lessee's covenants were in the form well and sufficiently to repair, etc., and keep the said messuage in, by, and with all manner of needful and necessary reparations and amendments whatsoever, and at the end of the term to yield up the said messuage so well and sufficiently repaired, etc. " (reasonable use and wear thereof in the mean time only excepted) ". Tindal, C.J., is reported on the question of this repairing covenant at greater length in the report in 1 Moo. & R., at p. 336. The whole of Tindal's reported directions to the jury in this case are quite short and are well worth study. The more material part for our present purpose is where the Chief Justice says : " Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised." The report in 7 C. & P. is much shorter on the question of repairs, and summarises Tindal, C.J.'s, directions into the words (p. 133) : " Now, when a very old building is demised, it is not meant that it should be restored in an improved state, nor that the consequences of the elements should be averted : but the tenant has the duty of keeping it as nearly as may be in the state in which it was at the time of the demise by the timely expenditure of money and care."

These words of Tindal, C.J., have suffered from criticism in modern times. Cozens-Hardy, M.R., in *Lurcott* v. *Wakeley and Wheeler*, [1911] 1 K. B. 905 (C. A.), at p. 912, considered that the words were obviously too wide, and in an endeavour to explain away the words used by the great Chief Justice attempted to draw a distinction which it is difficult to find between the two reports, for the one merely summarises into shorter language what is said in the other. Buckley, L.J., usually so careful in his judgments, could not believe that Tindal meant what his words so lucidly said. Yet it was the eminent critics who were mistaken, and their error may perhaps, if one may be permitted to surmise, have arisen from the placing of too much reliance upon the headnotes of the two reports of *Gutteridge* v. *Munyard*, for neither headnote mentions the exception of reasonable use and wear in the covenant to yield up in repair. There was no such exception in the covenant in *Lurcott* v. *Wakeley*. Tindal, C.J., was directing the jury as to their findings of fact in respect of the particular covenant before them. The report in 1 Moo. & R. makes it clear that only part of Tindal's summing-up is reported, and no doubt he referred to the words of the covenant. He treated the covenant, including the exception of reasonable use and wear, as a whole. Without attempting to divide the covenant into fragments and analyse each portion of it, he stated its effect to the jury in its entirety, in relation to the particular building and dispute then before the Court. Tindal drew no distinction between an exception of reasonable use and wear, and an exception of fair or reasonable wear and tear; and it is thought that no distinction is to be drawn, the different forms of expression clearly being intended to mean the same thing.

The words of Tindal, C.J., cited above, may therefore be adopted as a lucid and accurate statement of what was, for over a century, the law governing repairing covenants containing an exception of fair wear and tear; that is to say, until the recent change in the law effected by the Court of Appeal, which will be considered later. Tindal, C.J., was dealing primarily with an old building, but his words are of general application. He was not in that case concerned with the effect of normal human user, but with the effect of the natural operation of time and the elements, and the rule which he laid down was that a diminution in value caused by those agencies constitutes a loss which falls upon the landlord but—and this was a most important qualification, drawn from the use of the word "reasonable" or "fair"—the tenant was by seasonable applications of labour to take care that the premises did not "suffer more than the operation of time and

nature would effect". To take an illustration, if the elements removed a tile from the roof, the tenant was by a seasonable application of labour to prevent further and greater damage ensuing. That was good sense, and clearly what the parties to the contract of tenancy had in mind. That branch of the exception which excludes fair or reasonable wear by the tenant never appears to have given rise to much difficulty. The tenant must make good damage caused by unreasonable user of the premises, but he is not liable in respect of dilapidations occasioned by normal and reasonable user.

Several more recent cases may now be referred to for the purpose of showing that the principle laid down by Tindal, C.J., has been regarded as good law and followed right down to modern times. In *Terrell* v. *Murray* (1901), 17 T. L. R. 570, there was a covenant to deliver up in as good repair and condition as at the date of the lease, reasonable wear and tear excepted. The lessor claimed from the tenant under this covenant sums for painting the outside woodwork of the house, repointing brickwork and repairing parts of the kitchen floor affected by dry-rot. It was held that the tenant was not liable, for the words "reasonable wear and tear" exclude dilapidations caused by the friction of the air, by exposure, and by ordinary use. This decision would seem to follow naturally from the authority of Tindal, C.J.; Bruce, J., however, in giving judgment said that it was a little curious that there was no very satisfactory authority as to the meaning of the words fair or reasonable wear and tear, and Phillimore, J., also felt some difficulty. In fact the only difficulty arising out of the words used by Tindal, C.J., would appear to be that he treated the entire covenant as a whole and stated its effect, without going into details as to what precisely the words of exception took away from the first part of the covenant. Since the exception is not normally encountered divorced from the covenant, Tindal's words in fact provided a practical guide for most cases. Tindal, C.J., was of course addressing a jury and not instructing a school of lawyers.

Miller v. *Burt* (1918), 63 S. J. 117, arose upon a special case stated by an arbitrator as to covenants by a lessee to keep premises, which were old and in a bad state of repair at the date of the lease, in the same state of repair in which they then were, fair wear and tear excepted, and to deliver up the same in such repair and condition on the determination of the term. The Divisional Court (consisting of Darling, Coleridge and Avory, JJ.) went back to the decisions of Tindal, C.J., in *Gutteridge* v. *Munyard* and *Mantz* v. *Goring* for the principles to be applied, and

found no difficulty in understanding those cases and the law there laid down. The Court therefore agreed upon a formula for the guidance of the arbitrator, and instructed him that while the tenant was responsible for repairs necessary to maintain the premises in the same state as when he took them, yet if wind and weather had a greater effect on the premises, having regard to their character, than if the premises had been sound, the tenant was not bound so to repair as to meet the extra effect of the dilapidations so caused. While this formula may at first sight appear to be complicated, it will be seen upon examination to be simply a straightforward application of the principles laid down by Tindal, C.J., to the special covenant of the particular case.

The last of the leading decisions in which the principles laid down by Tindal, C.J., were followed was *Haskell* v. *Marlow*, [1928] 2 K. B. 45; 97 L. J. K. B. 311. This was not a case of landlord and tenant, but of a tenant for life of a house under a will who was under the duty of "keeping the same in good repair and condition (reasonable wear and tear excepted)". The tenant for life did nothing actively to injure the premises, but did nothing substantially to counteract the natural process of decay, and a question therefore arose as to what precisely was comprised within the exception of reasonable wear and tear. The Divisional Court reviewed all the cases which have been mentioned above, and referred also to *Scales* v. *Lawrence* (1860), 2 F. & F. 289, *Davies* v. *Davies* (1888), 38 Ch. D. 499; 57 L. J. Ch. 1093, *Citron* v. *Cohen* (1920), 36 T. L. R. 560, and *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D. 507. These last-named cases all involve questions as to the fair wear and tear clause, but they do not really add anything further upon the question of construction to the general principles laid down in the cases discussed above.

Having reviewed the authorities, the Divisional Court in *Haskell* v. *Marlow* considered the question what was the precise construction to be placed upon the words "reasonable wear and tear". Salter, J., at pp. 56 to 57 said: "In my opinion, such words as 'fair' and 'reasonable' in an exception of this kind qualify both the destructive agencies and also the dilapidation which they bring about. Such words can be used no doubt to qualify human user, but they could not be used to qualify forces of nature. It would be impossible to speak of an 'unfair rain' or an 'unreasonable frost'. To bring dilapidations within the protection of such an exception as that in this case, I think that two things must be shown: First, that the dilapidations for which exemption is claimed were caused by normal human use or by the normal action of

the elements, and, secondly, that they are reasonable in amount, having regard to the terms of the contract to repair the premises and the other circumstances of the case. In the present case there was an omission to repair for a very long period of time. For forty-two years the widow was tenant in possession, and failed to take any steps to counteract the natural process of decay. On those facts I have some difficulty in holding that these dilapidations were not caused by reasonable wear and tear, but I am quite clear that they are not reasonable wear and tear on the ground that they are altogether unreasonable in amount and inconsistent with the plain intention of the testator." It should be noted that Salter, J., draws a clear distinction between dilapidations *caused by* reasonable wear and tear, and dilapidations which *are* reasonable wear and tear.

Talbot, J., construed the clause in a similar way. He said, at p. 59 : " If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce." Talbot, J., employed the illustration of a tile falling off the roof. That in itself is reasonable wear and tear, due to the action of the elements. But, said Talbot, J., if the tenant does nothing and in the result more and more water gets in, so that great damage is done and even the whole house may become uninhabitable, he cannot say that it is due to reasonable wear and tear. In Talbot, J.'s, own words : " Far the greater part of it is caused by the failure of the tenant to prevent what was originally caused by wear and tear from producing results altogether beyond what was so caused. On the other hand, take the gradual wearing away of a stone floor or staircase by ordinary use. This may in time produce a considerable defect in condition, but the whole of the defect is caused by reasonable wear and tear, and the tenant is not liable in respect of it."

The judgments in *Haskell* v. *Marlow* have been referred to at some length because it is thought that they represent the mature

development of the common law upon the construction of the fair wear and tear clause. The passages cited follow directly in the wake of the exposition of the law quoted above from Tindal, C.J. : "But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect." Those words could be read into either of the judgments in *Haskell* v. *Marlow*. All this well-established law has, of course, now been swept aside by the Court of Appeal, but before discussing the recent case of *Taylor* v. *Webb* it is desired to emphasise the fact that right from Tindal, C.J., down to modern times there was a perfect continuity of thought. The principles laid down a hundred years ago were applied and developed, in some respects explained and made clearer, but never repudiated. Upon the basis of those principles of construction, conveyancers throughout the land made frequent use of the fair wear and tear clause. Although difficulties might from time to time arise over the application in detail of those rules of construction, the fundamental principles were never in doubt, and *Haskell* v. *Marlow* was not laying down new law but merely declaring old law upon which an established practice of conveyancers had for a long time been founded. If there was any difference of opinion at all as to the effect of the clause, it was that some commentators tended to belittle its effect and said that it really excluded even less than the authorities cited above in fact decided.

Such was the position prior to the recent decision of the Court of Appeal in *Taylor* v. *Webb*, [1937] 2 K. B. 283; 106 L. J. K. B. 480. In that case an under-lease of a house contained a covenant by the under-lessors to keep the outside walls and roofs in repair as and so far only as was required to be done by them under the head-lease. By the head-lease the lessees covenanted to keep the premises "in good and tenantable repair (destruction or damage by fire and fair wear and tear excepted)". The case came before du Parcq, J., in the first instance, and du Parcq, J., followed *Haskell* v. *Marlow* and construed the covenant in the manner directed by that case. The case involved the precise illustration taken by Talbot, J. A slate, cracked by age, wear and tear, was neglected. In time more and more water penetrated, the condition of the house steadily became worse, and ultimately a large part of the house fell into a most serious state of disrepair. The whole of the disrepair was due to the elements, coupled with the absence of any steps by anybody to prevent further progress of the decay.

It is to be noted that in this case the covenant was a landlord's covenant to repair. The inclusion of the fair wear and tear clause

in a landlord's covenant produces a curious result, inasmuch as the landlord thereby undertakes liability in respect of dilapidations caused by unreasonable user by the tenant, but not in respect of dilapidations caused by reasonable user. This is a somewhat anomalous agreement to make, but the point does not affect the question of construction now under discussion. The question what is " fair wear and tear " when that phrase is applied to the action of the elements is independent of the point that the covenant is a landlord's covenant. *Haskell* v. *Marlow* was therefore directly in point, and if that case had been followed the covenantor would have been held liable.

The Court of Appeal, however, overruled *Haskell* v. *Marlow* and held that the covenantor was not liable for any of the consequential damage which flowed from the failure to repair the cracked slate. The view taken was that if the obligation to repair the slate was not his, then he could not be held responsible for damage flowing from an obligation to repair which was not his. Scott, L.J., examined very carefully the words contained in the expression " fair " or " reasonable wear and tear ", and came to the conclusion that while " fair " and " reasonable " are applicable to the way in which the tenant uses the premises, neither word is applicable to the elements as a cause of wear and tear. The elements cannot be said to be reasonable. The Court of Appeal considered therefore that the word " reasonable " or " fair " applies only to the treatment of the premises by the tenant. The view expressed in *Haskell* v. *Marlow* that the words " reasonable " and " fair " applied also to the quantum of effect produced by wear and tear, that they qualified the amount of dilapidations as well as the destructive agency, was rejected and overruled. The effect of the decision is that the exception of fair wear and tear has now been held to except from the repairing obligation the following classes of disrepair :

(a) that brought about by the normal or ordinary operation of natural causes, such as wind and weather, and without regard to the reasonableness or unreasonableness of allowing the natural causes to continue producing those results unchecked;

(b) that brought about by the tenant, and other persons on the premises with his consent, in the course of fair or reasonable user of the premises for the purposes for which they were let.

It will be seen that the Court of Appeal has departed very considerably from the principles laid down by Tindal, C.J. Now it is decided that the tenant need take no " care that the premises do not suffer more than the operation of time and nature would effect ". No longer, it seems, need he make the seasonable applica-

tions of labour referred to by Tindal. Although he has covenanted to repair, the exception of fair wear and tear now appears to excuse him absolutely from remedying any dilapidations which can be traced back to the action of the elements or to reasonable user of the premises. It may well be thought that the exception, so construed, will now virtually cancel out the covenant in many cases, for the dilapidations now held to fall within the exception are by far the commonest dilapidations occurring in actual practice.

It is therefore of interest to examine the line of reasoning adopted by the Court of Appeal in reversing so well-established a rule of construction. In fact, although some authorities were referred to, the Court of Appeal never considered *Gutteridge* v. *Munyard* or *Mantz* v. *Goring*. No mention was made of the construction placed by Tindal, C.J., upon repairing covenants containing the exception of reasonable wear and tear. There was no discussion as to the authority of Tindal's words or as to the great length of time during which they have been followed and applied by the Courts and relied upon by conveyancers inserting the time-honoured clause in their leases. It is a recognised principle that where for a long time conveyancers have, in reliance upon past decisions, used a particular form of words to express a particular meaning, the very strongest of reasons will be needed to induce the Courts to reverse the old-established decisions which have so been acted upon by the profession. The reports of *Taylor* v. *Webb* contain no indication that the Court of Appeal accorded any consideration at all to this aspect of the question, and the decision proceeded mainly upon a painstakingly careful examination of the grammatical meaning of the words used in the clause. One may perhaps be permitted the respectful observation that where conveyancers have for a long time used an elliptical and idiomatic expression as a common form clause, the precise meaning of the words used is of less importance than the meaning which conveyancers have, by long usage of the words in a particular sense, fixed upon them for conveyancing purposes.

In the case of the fair wear and tear clause, there can be no doubt that conveyancers in general thought the words were to be given the meaning assigned to them in *Haskell* v. *Marlow* and all the earlier decisions which that case followed. In fact the clause is now held to exclude far more from the repairing obligation than was intended by the conveyancers who used the clause, and unless any different decision is in any case made by the House of Lords, it is anticipated that considerable difficulty may now be encountered in practice in enforcing repairing covenants with

the fair wear and tear exception. It may confidently be surmised that no conveyancer using the clause in a covenant ever imagined for one moment that he was binding the covenantee to so little.

In these circumstances it is thought that conveyancers will do well to avoid using the exception of fair wear and tear as it has been worded in the past, and a new draft covenant is included among the Precedents in this issue of *The Conveyancer* (*post*, p. 388), which is intended to avoid the difficulty caused by the decision in *Taylor* v. *Webb*.

LANDLORDS' COVENANTS.

I. Quiet enjoyment.

The chief impression gained by a layman, when perusing a tenancy agreement or a lease, must surely be that there are a vast number of provisions stating what the tenant must do or refrain from doing; but that the sole obligation of the landlord is to allow the tenant—if he performs his multifarious obligations —quietly to enjoy the premises in question. It is common knowledge amongst lawyers that the lay tenant generally supposes that the landlord's covenant for quiet enjoyment means in law two things :—

(1) That the tenant is to have quiet enjoyment in the sense that he is to have peaceful and not merely undisputed occupation. In the case of a block of flats or a house let off in parts, it often happens that one of the tenants complains to the landlord that another tenant is making undue noise late at night, or is otherwise disturbing the tenant. In such cases the complaining tenant usually draws attention to the words "quiet enjoyment", hoping, in mistaken faith and trustfulness, that these words mean quiet enjoyment in the literal sense.

(2) That the landlord warrants his right to grant the lease or tenancy agreement.

Unfortunately for the tenant both of these suppositions are quite incorrect. In the first place the landlord does not by covenanting that the tenant shall have quiet enjoyment impliedly promise that the tenant shall be able to repose peacefully at night or enjoy quietude by day. The landlord might, for example, let the property adjoining or even another part of the same house for trade purposes. Even though the machinery there installed should set up a certain amount of annoying vibration and noise, the tenant would have no remedy in law, under the implied covenant for quiet enjoyment (see *Jaeger* v. *Mansions Consolidated* (1903), 87 L. T. 690). The tenant may, of course, have a remedy against the other tenant in respect of nuisance (*Jenkins* v. *Jackson* (1888), 40 Ch. D. 71); but it is not easy to establish nuisance in law, particularly as the Court strains against holding

that the conduct in a proper and orderly manner of a lawful trade or calling amounts to a legal nuisance. The implied covenant for quiet enjoyment is in fact a covenant for title. The landlord's promise is that the tenant shall have physical occupation and shall not be lawfully ejected. This brings us to the second supposition made by the tenant.

Perhaps the most interesting point in connection with the covenant (in the form in which it invariably appears in draft leases) is that it is inserted for the protection of the landlord, and not for the benefit of the tenant. No doubt the tenant presumes that this clause is inserted in order to make it clear that the tenant is to have the right to occupy the property without interference by the landlord or anyone else; but this presumption is unfortunately incorrect. It is true that in most parts of the country the lease or tenancy agreement is prepared at the expense of the tenant; but it is prepared on behalf of the landlord by his solicitor, whose duty it is to afford to the landlord the maximum protection compatible with the circumstances of the case.

We can best appreciate the reason for the insertion of the limited form of covenant for quiet enjoyment if we first consider the position when no covenant of any kind for quiet enjoyment is contained in the lease or tenancy agreement. If the document is a lease under seal, then if during the continuance of the lessor's estate the lessee is ousted, whether by anyone claiming under the lessor or by title paramount, *e.g.*, as superior landlord, the lessee can recover damages from the lessor for breach of the implied covenant arising from the word demise. This covenant was implied by the common law and has no connection with the covenants implied by the Conveyancing Act, 1881, and later by the Law of Property Act, 1925. As authorities for this proposition see *Burnett* v. *Lynch* (1826), 5 B. & C. 589, at p. 609; *Iggulden* v. *May* (1864), 9 Ves. 325, at p. 330, and the more recent case of *Budd Scott* v. *Daniel*, [1902] 2 K. B. 351.

If, however, the document is an agreement to let whether (under seal or otherwise) and not an actual demise it is true that a covenant for quiet enjoyment is implied, but it appears that the covenant implied in such cases extends only to the acts of the landlord and those claiming under him (*Jones* v. *Lavington*, [1903] 1 K. B. 253). This covenant, like the covenant implied by the word "demise", is also limited to the period of the landlord's own estate or interest. Thus if the landlord's own lease expires in 1942, and he purports to grant a lease expiring in 1947, the implied covenant will not assist the lessee if ousted after 1942 by the superior lessor (*Baynes* v. *Lloyd*, [1895] 1 Q. B. 820;

2 Q. B. 610; *Schwartz* v. *Locket* (1889), 61 L. T. 719). It may happen that the lessee is never "ousted" because he is unable to obtain possession. Just as an agreement to let implies from its very nature that the tenant is to have possession so it has been held that the formal grant of a lease by the use of the word "demise" implies an undertaking to give possession (*Coe* v. *Clay* (1829), 5 Bing. 440). It also appears that the word "demise" implies a covenant by an underlessor to pay the rent reserved by the lease under which he holds the demised premises and to perform his obligations thereunder (*Hancock* v. *Caffyn* (1832), 8 Bing. 358). It should be noted, however, that the covenant so implied is a covenant by way of indemnity only. The lessee cannot, for example, himself require that the underlessor should perform covenants to repair or decorate the demised premises merely on the ground that such works are required to be performed under the terms of the head lease, and that the head lessee when subdemising the premises has undertaken to perform his obligations under the head lease. Of course, there is nothing to prevent the underlessor from contracting expressly to perform the terms of the head lease and stating therein that the covenant is by way of a separate covenant with the underlessee and not by way of indemnity only. In that event the underlessee will have the right to enforce the covenant directly and not merely to claim an indemnity if the head lessor makes requirements under the head lease or seeks to forfeit it. In this connection it must be remembered that if the head lease is forfeited then (unless relief is granted to the undertenant under section 146 of the Law of Property Act, as amended by section 1 of the Law of Property (Amendment) Act, 1929) the underlease automatically disappears with it.

The implied covenants above referred to do not apply to the *wrongful* acts of strangers in any case. Thus A grants to B a lease of Blackacre. B is wrongfully ejected by a third party. B must take proceedings against the third party, and cannot sue A upon the implied covenant for quiet enjoyment (*Hayes* v. *Bickerstaff* (1675), Vaughan 118; *Wallis* v. *Hands*, [1893] 2 Ch. 75).

When we come to consider the position where an express covenant for quiet enjoyment is given it is a much simpler matter. If a lease contains an express covenant for quiet enjoyment (however limited or qualified such covenant may be), no implied covenant for quiet enjoyment can arise. The maxim "Expressio unius est exclusio alterius" applies; and the position is governed entirely by the wording of the express covenant. The covenant

may be unqualified. In that case the landlord will not be liable in respect of the tortious acts of strangers, but he will be liable in respect of all lawful acts of all persons whatsoever whether claiming under him or by title paramount. Hence the covenant is not limited to the lessor's estate, and does afford a remedy in damages if the superior landlord re-enters for breach of the terms of the superior lease. So if the landlord's title is defective and the tenant is evicted by a person having a better title the landlord will be liable in damages.

If such a covenant were normally inserted in leases, the tenant could hardly complain. In practice, however, the covenant usually inserted is that the tenant shall hold the demised premises without interruption by "the landlord or any person lawfully claiming under or in trust for him". Such a covenant will give to the tenant no remedy if ejected or otherwise damnified in consequence of the landlord's failure to comply with the terms of the lease under which he holds the property, or in consequence of the landlord's defective title. Indeed, it has rightly been observed that such a covenant may safely be given by a person who has no title whatever to the property. In these circumstances it is clear that where the tenant is likely to expend a substantial sum of money upon decorations or works of repair or alteration, such as the installation of an expensive shop front, he is entitled to expect some sort of warranty that the landlord is entitled to grant the lease, that no third party can lawfully eject the tenant, and that if the landlord himself holds the property as lessee, the landlord will not do or omit anything whereby his own lease shall be forfeited. The situation can suitably be dealt with as follows :—

(1) The qualified covenant for quiet enjoyment should be extended by adding after the words "lawfully claiming under or in trust for the landlord" the words "or by title paramount".

(2) If the letting is by way of underlease the underlessor should covenant "Duly and punctually to pay the rent reserved by the lease under which the landlord holds the demised premises and to perform and observe the covenants and conditions therein contained and on the part of the lessee thereunder to be performed or observed (except in so far as the liability in respect thereof is imposed upon the tenant by this present underlease) and to keep indemnified the tenant from and against all actions, proceedings, costs, damages, losses, claims and demands arising out of any non-payment of the said rent

or the breach or non-performance of the said covenants and conditions or any of them ".

As has been pointed out above the covenant should be expressed to be made " as a separate covenant with the tenant, and not by way of indemnity only " if the tenant is in fact relying upon the underlessor to carry out works of decoration or repair conformably with the terms of the lease under which the landlord holds the property. Otherwise, unless the superior landlord can be persuaded to interest himself in the matter the tenant may be without remedy, and may even be compelled for his own convenience to effect the work himself. Moreover, it must not be forgotten that the superior lessor, even if willing to assist, may be quite unable to do so effectively. Let us assume that the undertenant is required by the terms of the underlease to keep the demised premises in good and tenantable repair fair wear and tear and damage by fire excepted. Assume also that the underlessor holds under a lease which imposes upon him the obligation to keep the demised premises in repair, without the exceptions just mentioned, there being no provision enabling the superior lessor to carry out the work and recover the expense from the underlessor in case of default. If the underlessor's lease has, say, forty years to run and the work required to be carried out is the removal of hearths or fireplaces, or the replastering of walls or the making good of a ceiling which has fallen or other similar work not requisite immediately for the preservation of the structure, but possibly essential for the reasonable enjoyment of the property, the superior lessor may, of course, sue for damages, but in that case by virtue of the Landlord and Tenant Act, 1927, he can only recover the damage to the reversion, *i.e.*, the sum by which the immediate value of the reversion is decreased by reason of the non-execution of the works in question at that date, having regard to the fact that the underlessor still remains liable to deliver up the premises in good repair. It will be appreciated that the decrease in value of the reversion in such circumstances may be purely nominal, and in any case the recovery of damages will not assist the underlessee. Again, the superior lessor may proceed by way of notice under section 146 of the Law of Property Act, 1925, claiming forfeiture for breach of covenant; but in such proceedings the Court may grant relief under section 147 of the Act, and very probably would do so in cases where the underlessor's lease had a substantial period to run, that the work was not necessary for putting or keeping the property in a sanitary condition, or for maintaining or preserving the structure, unless the liability arose under an express covenant to put the property

in a decorative state of repair (see s. 147 (2)). The Court cannot, however, grant relief under section 147 in respect of any statutory liability to keep a house reasonably fit for habitation. This statutory liability does not, of course, apply to all classes of houses, but applies to "working class" houses under the Housing Act, 1930.

II. Insurance.

When a lease is granted for a term of seven years or upwards the tenant is required either to insure the demised premises against fire or to repay the insurance premium to the lessor. Very often the tenant covenants to repay all sums expended by the lessor, but there is no covenant by the lessor either to keep the demised premises insured or to reinstate the property if damaged by fire. The tenant cannot compel the landlord to insure unless he has expressly covenanted to do so (*Gott* v. *Gandy* (1853), 2 El. & Bl. 845; 23 L. J. Q. B. 1); and it is, therefore, important that such a covenant should be inserted, and that the landlord should agree to produce on demand the policy and the receipt for the premium last accrued due and in case of damage by fire to reinstate with all proper speed. The covenant to produce or furnish particulars of the policy is essential as, unless the tenant can obtain particulars as of right it will be impossible for him to know whether the property is insured if the landlord does not think fit to answer his inquiries. In order that the policy moneys may not be taken by the landlord instead of being applied in reinstatement the tenant should ask that the insurance be effected in the joint names of the landlord and the tenant. In any event inquiry should be made as to the insurance, existing or intended, and immediately on exchange of leases notice should be given of the tenant's interest, in case of oversight by the landlord, which may easily occur if the landlord's existing policy is merely being continued in force.

The suggested form of covenant to be employed is as follows :—

> "That the landlord will keep insured against fire in the joint names of the Landlord and the Tenant in one of the tariff insurance offices or with Lloyd's underwriters in a sum sufficient to cover the cost of rebuilding the same in case of total destruction [all buildings included in the tenancy] *or* [the building of which the demised premises form part] and on request to produce to the Tenant the policy or policies of insurance and the receipt or receipts for the

premium or premiums last accrued And in case of damage to or destruction of the demised premises [or of any part of the building of which the demised premises form part] to reinstate and make good the same with all reasonable speed (unless the insurance moneys shall be irrecoverable owing to any breach or non-performance of the Tenant's obligations hereunder) Provided nevertheless that all insurance moneys actually received by the Landlord shall be applied in such reinstatement and making good as aforesaid so far as the same shall extend."

It should not, of course, be overlooked that the lessee will remain liable to pay the rent in full notwithstanding that the premises are completely burnt down. Accordingly it is not sufficient to provide that the landlord will insure against fire and reinstate in case of damage by fire. It should also be provided that in such an event the rent or a fair proportion of it according to the extent and nature of the damage should be suspended and cease to be payable until the damage is made good. Incidentally, where the letting is of part of a building, and such part is not approached directly but from some other part of the building, the clause should provide for cesser or abatement in the event of damage to or destruction of the demised premises or any part thereof "or of any other part of the building of which the demised premises form part". This point is often overlooked in practice, but may be of considerable importance, particularly if the rent is substantial. Sometimes it is provided that the rent is to cease, or to abate, immediately, and sometimes it is provided that the rent shall cease or abate three, six or even twelve calendar months after the fire. In principle it would seem that the cesser or abatement should operate immediately, since the tenant is otherwise paying rent for accommodation of which he is in fact deprived, and the fact that the tenant can insure for one year's rent does not seem to be a sufficient answer. In practice, however, the landlord often insists that the allowance shall only commence after a period of six or twelve months, so as to permit of ample time within which to adjust the claim with the insurers and to reinstate the building. In such cases it is, of course, essential to advise the tenant to insure for six or twelve months' rent.

It will be seen that the relief afforded to a tenant by a provision for cesser of rent in case of fire is only partial, as even if the premises are completely destroyed and not reinstated the tenancy still remains in force. Generally reconstruction will take place within a year or less; but in the absence of any special

provision to the contary it is conceivable that some years may elapse before reinstatement takes place. After such a lapse of time, whether the premises are used for residential or trade purposes it may be quite impracticable for the tenant to resume occupation. Generally speaking a "loss of profits" policy will only cover a period of one year, so that a trading tenant cannot simply sit with folded hands; but must find other accommodation in which to continue his business.

If the lease contains a covenant by the landlord to reinstate with all speed no doubt the tenant will have his remedy in law; but if the premises are not in fact insured, or the policy moneys are irrecoverable, and the landlord has not sufficient private funds with which to pay for the reinstatement, this remedy is of no practical value. Again, the landlord may not have entered into a covenant to rebuild in case of fire. In that event he may collect the insurance moneys from the insurers and refuse to rebuild (*Lofft* v. *Dennis* (1859), 1 El. & El. 474; *Leeds* v. *Cheetham* (1827), 1 Sim. 146). It is therefore desirable, whether there is or is not a covenant by the landlord to insure against fire, to add to the cesser of rent clause a provision enabling the tenant to determine the tenancy if the premises are not fully reinstated within a given period after the occurrence of the damage by fire. The suggested clause is as follows :—

> "Provided that if such destruction or damage as aforesaid shall not have been fully made good meanwhile the Tenant may at any time after the expiry of three calendar months from the occurrence of such destruction or damage by giving to the Landlord written notice of such his desire determine the tenancy on the next succeeding or any subsequent day for the payment of rent but no such notice shall be valid or effective if upon the expiry of such notice any part of the premises comprised in the tenancy shall not have been vacated or shall be subject to any subsisting sub-tenancy created by the Tenant."

III. Repairs.

When the tenant is exempted either expressly or tacitly from liability in respect of repairs, whether to the structure, roofs, drains or other parts of the premises, it is quite unusual to find in the draft lease as prepared by the landlord's solicitor any covenant by the landlord to carry out those works. It therefore follows that the tenant's solicitor should press for the insertion of such a covenant; for if neither party is under an obligation to do

these works a very common result is that the unfortunate tenant is compelled for his own convenience to carry out the works. It is true that there are certain works which local or other competent authorities may require to be done, and in respect of *some* of these works the tenant will not be responsible as "owner" of the premises, although tenants for twenty-one years or upwards are owners within the meaning of a number of statutes. On the other hand, there are other works which may be essential to the convenient enjoyment of the property, and with which public authorities are in no way concerned. Thus, the local authority is not entitled to take any action if the roof of trade premises or residential property (other than "working class" houses) leaks; but it is obvious that the occupying tenant will be forced to repair the roof if the landlord refuses or neglects to do so.

Generally insufficient attention is given in leases to the exact ambit of the landlord's repairing covenant. Sometimes the landlord undertakes to keep the structure and main drains in good and tenantable repair, and to keep the outside in good decorative condition, the tenant being required to keep the interior of the premises in the like repair, the general intention in fact being that the tenant is only responsible for keeping the interior in good and tenantable decorative condition. Such provisions, however, are quite inadequate to meet the situation. The tenant remains responsible for numerous works of permanent improvement such as the complete replacement of floors which have decayed owing to dry-rot already existing at the date of the lease, the retiling or reslating of the roofs, the supplying of new cisterns and boilers, new hearths and mantelpieces, and the making good of inner walls and of the structure of ceilings which have fallen through age (as distinct from mere papering or whitewashing and filling of cracks), and the repair and replacement of sanitary and water apparatus. From the writer's experience it is clear that the tenant in such circumstances generally has no idea that he is liable for these works, and it would seem that the liability which the tenant expects the landlord to assume might be expressed in the following form of covenant:—

> "To keep the demised premises including the landlord's fixtures therein and the electric cables and wiring gas pipes water pipes and drains therein or appurtenant thereto in good tenantable and serviceable condition except only as to works of decoration to the interior of the demised premises [and to keep the private road or passage way coloured —— on the plan hereto annexed in good repair and condition to the intent that the same shall at all times be fit for the convenient

passage of vehicular traffic over the full width thereof and free from any obstruction]."

The tenant would merely covenant "to carry out all such works of decoration (as distinct from works of repair) as may be necessary to keep the interior of the demised premises in good and tenantable condition". If the letting is for a substantial period, such as fourteen or twenty-one years, no doubt it will be reasonable either to couple this general tenant's covenant with the usual precedent clause as to painting, graining, varnishing, whitewashing, etc., once in each seventh year, but generally in the case of such leases the tenant will be required to assume a rather heavier responsibility. It may be that in a substantial percentage of cases the landlord will not agree to enter into a covenant in the form above suggested, but this very fact emphasises the necessity of determining and defining the actual liabilities legal and practical of the intending lessee. It is important that the lessee's solicitor should obtain for his client the most advantageous form of lease obtainable, but however successful or unsuccessful he may be it is even more important that he should, in the simplest terms possible, advise his client of the result of his efforts, so that the client may understand the liabilities which he is undertaking. Here again experience shows that this advice is best expressed in the form of a letter to which the client can refer usefully at a later stage when questions arise. Moreover, it is generally impossible to satisfy a client at a later date that his liabilities were verbally explained to him, and very often it is impossible to remember what explanation was in fact given. Careful revision with due regard to the above points will, on the return of the draft lease, serve to focus the matters which it is necessary to mention to the client.

Unless otherwise provided in the lease a covenant by a landlord who is not in occupation or control of part of the building himself to keep in repair the property or some part of it does not impose any liability on the landlord to carry out works unless and until he has received notice of the want of repair. For example, if a non-resident landlord covenants to keep in good repair the interior of the premises he is not liable in damages for neglecting to carry out such repairs unless he has received notice of the want of repair and has failed to carry out the necessary works (*Tredway* v. *Machin*, [1906] 2 Ch. 166; *Mackin* v. *Watkinson* (1870), 6 Exch. 25). But if the landlord remains in possession of part of the building and has covenanted to keep that part in repair this rule does not apply (*Melles & Co.* v. *Holme*, [1918] 2 K. B. 100). Moreover the rule is not absolute. As was said by

Lord Buckmaster in *Murphy* v. *Hurley*, [1922] 1 A. C. 375, "The doctrine depends upon the actual facts existing in each case and upon the consideration whether the circumstances are such that knowledge of what may be required to be done to comply with the covenant cannot reasonably be supposed to be possessed by the one party while it is by the other."

Where the landlord is liable under a covenant to repair he must act promptly and urgently. Thus where the tenant notified the landlord that the front steps required attention, and after the builder had been instructed to see to the matter, but before anything had been done, the tenant sustained injuries, the landlord was held to be liable in damages (*Griffen* v. *Pillet*, [1926] 1 K. B. 17). Even apart from covenant where flats with common approaches are let the landlord is responsible, regardless of notice, for keeping the approaches and common stairways in safe condition (*Dunster* v. *Hollis* [1918] 2 K. B. 795). Whilst considering this question it is desirable to point out that so far as regards gutters or other overhanging fittings, etc., the tenant is in any case responsible to third parties as occupier of the property, quite apart from contract (see *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K. B. 551; *Wilchick* v. *Marks*, [1934] 2 K. B. 56).

If the letting is of part of a building, and certain other parts, such as landings, staircases, lavatories, entrance hall, steps, bathroom, are to be used by the tenant in common with other occupiers of the building, the landlord should covenant to keep those parts in good and tenantable repair and in clean and neat order and condition, and (where suitable) properly lighted during hours of darkness. As to staircases and landings a covenant by the landlord to keep these carpeted or covered with linoleum may be required.

The landlord may have thrown the liability in respect of some of these matters upon other tenants of the building; but as the tenant of any one part will have no means of compelling other tenants to carry out their obligations it seems reasonable that the landlord should accept responsibility for ensuring that the necessary works are in fact carried out from time to time. Similarly, if the tenant is to have the use, in common with other occupiers, of a lift, the landlord should covenant to keep it in repair and working order, except during periods of temporary breakdown, and in case of any breakdown to effect the necessary repairs with all speed, and (in suitable cases) to provide an attendant during specified hours to work the lift. As to other services to be provided by the landlord such as heating of rooms, hot water supply and the like, similar considerations apply.

IV. Rates and Taxes.

If the rent payable by the tenant is inclusive of rates and taxes, the covenant by the landlord to pay all rates, taxes, assessments and outgoings should on no account be omitted. In the absence of any express provision, the tenant will be liable to pay all rates and taxes except (a) property tax, (b) tithe rentcharge annuity, (c) land tax, (d) sewers rate, and (e) (if the tenancy is for three months or less) the poor rate. Therefore the ordinary general rate and the poor rate (except as last mentioned) and other local rates (except private improvement or local improvement rates to which special provisions may apply) will in general fall to be paid by the tenant in the absence of an express covenant by the landlord to pay them.

Further, if the rent is stated to be a "net rent" or "clear of deductions" the tenant will be liable (in the absence of any express stipulation, or other indications to the contrary) to pay the sewers rate, poor rate, general rate, land tax, and all other rates and taxes except property tax on the rent (*Bennett* v. *Womack* (1828), 7 B. & C. 627; 6 L. J. (o.s.) K. B. 175).

Again, if the tenant is liable only to pay rates and taxes of an annual or other recurring nature as distinct from outgoings generally, the landlord should covenant to pay all outgoings (except such as are of an annual or other regularly recurring nature) payable in respect of the demised premises. The point here is that the common form of unqualified covenant by the tenant to pay all rates, taxes and outgoings actually throws upon the tenant liability for expenses of complying with the requirements of local or other competent authorities, some of which arise out of permanent improvements such as the construction of roads. There is ample authority for the statement that even a tenant for a short term of years who has undertaken to pay "outgoings" is liable for roadmaking charges. Although in special circumstances a tenant from year to year was held not to be responsible for such expenses (see *Harris* v. *Hickman*, [1904] 1 K. B. 13; 89 L. T. 722), this decision was disapproved by the Court of Appeal in *Lowther* v. *Clifford* ([1927] 1 K. B. 13; 135 L. T. 200), in which it was held that a tenant holding over as a yearly tenant after the expiry of his lease was liable to pay road charges under the Private Street Works Act, 1892, under a covenant to pay outgoings.

Further, apart from any liability which may arise out of the wording of the repairing covenant itself, liability in respect of relaying of main drains may be thrown upon the tenant by the

covenant to pay outgoings, subject, of course, to any express exception in the repairing covenant. The provisions of the lease must, of course, be read together, and the tenant may be inferentially exempted. Thus although the tenant had undertaken to pay "outgoings" the landlord was held to be responsible for renewing the drains outside the house, under a covenant to do outside repairs (*Howe* v. *Botwood*, [1913] 2 K. B. 387). At the same time it will be appreciated that it is most desirable to make it clear that the liability excepted by the repairing covenant is not thrown upon the tenant by the word "outgoings" or "assessments". In such cases, therefore, the covenant to pay rates, taxes, assessments and outgoings should be qualified so as to refer to all rates, taxes (except landlord's property tax), assessments and outgoings *of an annual or other regularly recurring nature*. The question of works of permanent improvement of this kind should be considered particularly in relation to cases where the term is fairly lengthy but there is a right for the tenant to determine the lease, as in the case where a lease is granted for a term of twenty-one years but is determinable by the tenant at the expiry of the seventh or fourteenth year upon giving six calendar months' previous notice. In such a case it would be particularly unfortunate and obviously inequitable if after giving the requisite notice determining the tenancy at the end of the seventh year, road charges became payable under an apportionment made by the local authority. Cases may and do occur in which the tenant, although liable to meet these expenses, reaps no benefit whatever from the payment, since his tenancy has expired before the works are executed. In practice it is often possible to deal with this difficulty by a compromise on the following basis :—

(1) The landlord covenants to carry out all works of permanent improvement required by any competent authority to be executed in respect of the demised premises or the drainage thereof or the roads giving access thereto and to pay all expenses apportioned by any competent authority in respect of any such works executed by such authority.

(2) The tenant agrees to pay to the landlord by way of further rent a yearly sum equal to five per centum of the expenses incurred by the landlord in carrying out any such works and of the expenses apportioned by any competent authority in respect of any such works executed by such authority such further rent to accrue and be apportionable from day to day and to commence from the date when such works are completed and to be payable on the days for payment of rent as specified in the

reddendum of the lease during the subsistence of the term granted by the lease.

V. User of neighbouring premises.

If the property proposed to be carried on is a shop and the landlord owns adjacent shops, or the shop is one of a block of shops owned by the landlord, endeavour should be made to obtain from the landlord a covenant prohibiting the user of other neighbouring premises for any trade or business competing with that permitted by the terms of the lease which is being granted. The following covenant may be suitable for this purpose :—

> "The Landlord hereby covenants with the Tenant that no part of the premises known as —— shall during the subsistence of the term hereby granted be used for the trade or business of a —— or for any other trade or business for the time being carried on upon the demised premises [and authorised by any licence or consent granted by the Landlord] or any branch of such trade or business or for the sale or manufacture of any article for the time being sold or manufactured at the demised premises in the course of such trade or business as aforesaid."

The last portion of this covenant widens its effect substantially, as the sale of *some* articles within the scope of the prohibited trade is not necessarily a breach of the covenant against the carrying on of that trade (*Lumley* v. *Metropolitan Ry.* (1876), 34 L. T. 774); and notwithstanding that the sale of such articles is an important part of the trade of the person for whose benefit the covenant is taken, there is no breach if the general trade in the course of which such articles are sold is of a different category (*Stuart* v. *Diplock* (1889), 43 Ch. D. 343).

It is not sufficient for the landlord to covenant not to *let* the premises in question for any business which is competitive with that carried on by the tenant, as even if the lease of the neighbouring premises prohibits the tenant from carrying on a particular trade, the landlord's covenant is not broken. Nor has the tenant with whom the covenant has been entered into any direct right of action against such a competitor (*Brigg* v. *Thornton*, [1904] 1 Ch. 386; *Ashby* v. *Wilson*, [1900] 1 Ch. 66). Where A was under covenant for himself and his assigns not to do or "suffer" any act whereby the licence of a certain public-house should be forfeited and A sub-let to B who incurred a forfeiture, it was held that A was not liable for the following reasons : (1) B was not an assign of A, and (2) A was not the person who had done or

"suffered" the doing of the act involving a forfeiture (*Wilson* v. *Twamley*, [1904] 2 K. B. 99).

The more recent case of *Barton* v. *Reed*, [1932] 1 Ch. 362, following *Atkin* v. *Rose*, [1923] 1 Ch. 522, 533, establishes that where a head lessee covenants with his landlord not to "suffer" premises to be used for a specified purpose and his sub-tenant in breach of a covenant to the like effect uses the premises for the prohibited purpose, the head lessee is deemed to "suffer" the premises to be used for that purpose if, being entitled to do so, he refrains from taking steps to prevent such user by the sub-tenant. But if there is a reasonable doubt whether legal proceedings to prevent the continuance of such user would be successful, *e.g.*, if the head lessee is advised by counsel that he could not reasonably expect to succeed in proceedings to restrain the user by the sub-tenant he does not "permit or suffer" the user by refraining from taking proceedings (*Berton* v. *London Counties House Property Co.*, unreported, but referred to in the judgment in *Barton* v. *Reed*, *supra*). It is, therefore, obviously to the tenant's advantage to obtain an absolute covenant that the premises in question shall not be used for the purpose in question, in which case the landlord must at his peril so arrange any lettings or other interests granted by him that he can control the user. It must be borne in mind that if the user is restricted in this manner the covenant will probably be binding on the burdened premises into whosesoever hands it may come (including lessees) if registered under the Land Charges Act, 1925 (as to unregistered land) or entered on the register of the lessor's title (as to land registered at the Land Registry).

Before the Law of Property Act, 1925, though a lessee taking a lease from a freeholder had no right to call for the freeholder's title, he was affected with notice of all restrictive covenants and other matters affecting his lessor's title. This rule as to notice has, theoretically, been abrogated by section 44 (5) of the Law of Property Act, 1925. As to unregistered land, however, section 198 of the same Act appears to affect the lessee with notice of all land charges registered under the Land Charges Act, 1925. As to registered land it has been held that the lessee in such cases is affected by section 50 (2) of the Land Registration Act, 1925, with notice of restrictive covenants entered on the register of the title at the Land Registry (*White* v. *Bijou Mansions, Ltd.*, [1937] 3 All Eng. Reports 269; see note *post*, p. 69).

It is, therefore, apparently open to the protected tenant, if an absolute covenant is taken in the form mentioned above, to take proceedings against the actual lessee or occupier of the burdened

premises, thus obviating all technical difficulties arising by virtue of the decisions above referred to, and obtaining a remedy much more suitable than mere damages against the original lessor who may no longer be the reversioner, and may not, when the time comes, be worth powder and shot.

So far as concerns unregistered land, however, the position is somewhat clouded by a doubt whether a covenant restrictive of the user of the lessor's neighbouring land is registrable as a land charge. If it is not strictly registrable then registration does not affect a purchaser or lessee of the burdened land with notice and the protected lessee will be left to his remedy against the original lessor. The point is, therefore, worthy of consideration.

Under section 10 of the Land Charges Act, 1925, a covenant or agreement (not being a covenant made between a lessor and lessee) restrictive of the user of land, entered into after December 31, 1925, may be registered as a land charge (Class D (ii)). It has been suggested that covenants affecting the lessor's neighbouring land are not registrable because they are "made between lessor and lessee" (see Solicitors' Journal, December 16, 1933, January 13, 1934). It is submitted that this view is not tenable if the section is to produce a sensible result. The relationship of lessor and lessee means nothing except in connection with a particular parcel of land in respect of which the relationship of lessor and lessee exists. If A lets No. 12 Smith Street to B and concurrently enters into a covenant with B restrictive of user of No. 14 Smith Street, it is submitted that this covenant is not a covenant between lessor and lessee within the meaning of section 10 of the Land Charges Act, 1925. If this submission is incorrect then, so long as the relationship of lessor and lessee in respect of 12 Smith Street is subsisting, all other dealings between A and B are affected by this fact; so that if Smith Street is in London, and A also owns Blackacre and Whiteacre in Birmingham, and sells the freehold of Blackacre to B restricting to a certain extent the user of Whiteacre, this restriction cannot be effectively registered as a land charge. This would seem an absurd result, and it is suggested that the section assumes that the land the user of which is restricted is land in respect of which the relationship of lessor and lessee exists when the covenant is entered into.

If this suggestion is correct a covenant by a lessor of land restrictive of user of his adjoining land is registrable, and in order to be effective against purchasers of the burdened land must be so registered. In practice the Land Charges Department raise no objection to such registration, and it is therefore prudent to effect it.

On the other hand, a typical case in which a covenant between

lessor and lessee is not registrable occurs where the lessee covenants to use the demised land only for a specified purpose. Possibly the draftsman of the section appreciated that practically every lease contains at least one covenant which expressly or inferentially restricts the user of the land by the tenant, and desired to guard against the suggestion that such covenants had to be registered under the Act in order to bind assignees of the lease. *Quære*: whether a covenant by a lessor that the land demised shall not be used for a given trade within a specified period after determination of the lease, pursuant to a power in the lease, is registrable as a land charge. The position is not clear, as at the time when the covenant becomes actually enforceable (though not when it is entered into and becomes binding), the relationship of lessor and lessee is no longer subsisting. It is thought that such a covenant is not registrable, as the relationship of lessor and lessee exists in respect of the land affected at the date when the covenant is entered into, and this appears to be the true test. As to the enforceability of such a covenant against any purchaser of the land from the original lessor of the reversion it would, however, seem clear from such cases as *Chambers* v. *Randall*, [1923] 1 Ch. 149, 157, and *Miles* v. *Easter*, [1933] Ch. 611, 632, that there is no means of making such a covenant run with the reversion, as the lessee has no adjoining land to which the benefit of the covenant is annexed. The covenantee will, therefore, be relegated to his remedy in damages, which may be only nominal in amount.

VI. Covenant for Renewal.

Generally speaking it is suggested that it is preferable from the tenant's viewpoint to substitute for the proposed covenant for renewal a provision extending the term so as to include the period of the further lease which the landlord has agreed to grant, and to insert a power for the tenant to determine the lease at the date of the original term upon giving the usual six calendar months' previous notice. From the landlord's viewpoint it can be of little importance in which way the matter is carried through. If the result of this expedient will be to increase the term beyond thirty-five years it must, of course, be remembered that the stamp duty on the lease will be increased from £1 per cent. to £6 per cent.; but apart from this point the advantages to the tenant are as follows:—

(1) The right of renewal must be registered as an estate

contract under the Land Charges Act, 1925. Otherwise the tenant will be unable to enforce the covenant against any purchaser of the reversion even if he has purchased with express notice of the covenant (Land Charges Act, s. 13, L. P. A., 1925, s. 199 (1) (i)).

(2) If matters are going well it is very likely that the tenant will forget the exact provision in the lease as to the period at which the renewal notice has to be served, and may thus lose the benefit of the covenant, but this difficulty cannot arise if there is merely a power to determine the lease. On the other hand, if things are not going well it is extremely likely that the tenant will be awaiting anxiously the opportunity to determine the tenancy. On balance, therefore, the power of determination is much less likely to entrap the tenant.

(3) The immediate extension of the term will save the tenant the expense of a further lease if he decides to remain in occupation for the longer of the two periods. If the rent is substantial the saving in costs and stamp duty may be considerable.

There are, of course, special cases in which the landlord is unable to grant the further term immediately. Thus, if the landlord's lease is for seven years of which three years have expired, with an option for a further seven years' term, and he is proposing to grant a tenancy for three years with an option for a further three years' term, it is clear that this expedient cannot be followed, and the covenant for renewal must be accepted. The form of the covenant for renewal or power of determination should in any event be considered. If it provides that the further term will be granted or that the power of determination may be exercised "if the Tenant shall duly and punctually pay the rent hereby reserved and perform and observe the covenants and conditions herein contained and on the Tenant's part to be performed or observed", this portion of the clause should be deleted, and the landlord's solicitor should be asked to accept (in the case of a covenant for renewal) in substitution for the words last quoted the words "if the term hereby granted shall be subsisting up to the expiry of the term hereby granted", and in either case a provision at the end of the covenant for renewal or power of determination that the grant of the further lease or the determination of the term shall be without prejudice to the rights and remedies of either party against the other in respect of any outstanding breach or non-performance of their respective obligations under the original lease. The point is that if the provision above

mentioned remains in the lease the tenant may be deprived of his right to call for the further lease by reason of the subsistence at the expiry of the notice of a purely technical breach in respect of which he had received no complaint from the landlord (*Finch* v. *Underwood* (1876), 2 Ch. 310; *Job* v. *Banister* (1856), 2 K. & J. 374; *Bastin* v. *Bidwell* (1881), 18 Ch. D. 238 : similarly, as to a power of determination, *Burch* v. *Farrow's Bank*, [1917] 1 Ch. 606). As to powers of determination, it has been held in *Simmons* v. *Associated Furnishers, Ltd.*, [1931] 1 Ch. 379, that notwithstanding that the power of determination contains the "condition precedent" provision above referred to the notice determining the lease is valid if all outstanding breaches of covenant by the tenant have been made good before the expiry of the notice, although certain breaches were outstanding at the date when the notice was served. No doubt the position as to notices exercising options of renewal is similar. It will, however, be appreciated that in a large percentage of cases the landlord will have little difficulty in establishing that at least one technical breach of covenant is outstanding at the date of the expiry of the notice, and for this reason the revision above suggested should be made.

When the circumstances of the case compel the acceptance of a covenant for renewal, instead of the course recommended above, the following form of covenant may be usefully employed, in order to save the tenant the expense of a further lease or tenancy agreement, and stamp duty thereon :—

> "If the tenant shall desire to continue the tenancy for a further term of —— years from the expiry of the term hereby granted [*or* agreed to be granted] (hereinafter called the extended period) and of such his desire shall give to the Landlord written notice at least —— calendar months prior to the expiry of the term hereby granted [*or* agreed to be granted] then such term shall continue for the extended period and all the covenants and provisions herein contained shall remain in full force and effect throughout the extended period."

A covenant for renewal for a specified period subject to the same terms as the original lease does not confer a perpetual right of renewal (*Tritton* v. *Foote* (1789), 2 Bro. C. C. 636). It is, of course, open to serious doubt whether the giving of such a notice as above actually operates in law to create a legal term of years for the further period; but in the case of a tenancy for a short term, such as a period of three years with a right of renewal for a further three years, there would seem to be no reasonable

objection to the employment of this device. In the case of longer terms where the question of a legal term may arise upon mortgage or disposal of the lease it may be desirable to add a proviso that the tenant shall be entitled to the grant of a lease for the further term in question after the expiry of the notice if he so requests the landlord in writing, the grant of such further lease to be without prejudice to the rights of either party in respect of any breach of their respective obligations under the original lease.

Sub-section 3 of section 149 of the Law of Property Act, 1925, provides that, subject to certain exceptions not material for consideration in this article, "a term at a rent or granted in consideration of a fine limited after the commencement of this Act [*i.e.*, after the 31st December, 1925] to take effect more than twenty-one years from the date of the instrument purporting to create it shall be void, and any contract made after such commencement to create such a term shall likewise be void". This provision is sometimes understood as rendering void a covenant for renewal of a lease if such option is exercisable more than twenty-one years after the date of the lease conferring the right of renewal. This is however a misconception. This sub-section merely applies to reversionary leases granting terms in futuro, Thus if A in 1937 purports to demise to B premises for a term commencing in 1960, or agrees to grant such a lease to B, the purported lease or agreement for lease will be void. On the other hand, if A in 1937 grants a lease to B of the same premises for an immediate term, or for a term commencing within twenty-one years from the date of the lease, and such lease contains an option for B to renew the lease by notice given in 1960 or at any time thereafter, such option will be valid.

Not only are options for renewal free from any restriction under the sub-section just mentioned, but they are also free from any restriction under the rule against perpetuities. This rule, it will be remembered, does not apply to covenants running with the land, and it is well settled that a covenant for renewal runs with the land, and that the burden of it runs with and binds the reversion (*Roe* v. *Hayley* (1810), 12 East 464; *Muller* v. *Trafford*, [1901] 1 Ch. 54; *Woodall* v. *Clifton*, [1905] 2 Ch. 257). It has been remarked that it appears to be illogical that a covenant for renewal of a lease runs with the land but that an option of purchase therein does not and is therefore subject to the rule against perpetuities; but the law to this effect is too well established to be open to question.

Of course, the exception in respect of covenants for renewal arising out of the relationship of lessor and being based on the

fact that the covenant touches and concerns the thing demised, a contract or option for the grant of a lease to a stranger is subject to the rule against perpetuities, and therefore if A in 1937 agrees that he will in 1960 grant to B, a stranger, a lease of certain premises, this agreement will be void.

There is, however, a limit to the period to which a covenant for renewal may extend. By paragraph 7 of the Fifteenth Schedule to the Law of Property Act, 1922, it is provided that a contract for the renewal of a lease for more than sixty years is void. Although there are other provisions in that Act relating to rights of perpetual renewal this paragraph has no reference to such rights. It merely means that if the landlord purports to give to his tenant the right to renew the lease for a specified period that period must not exceed sixty years. It would seem that a number of successive rights of renewal for sixty years may still be granted. Perpetually renewable leases can no longer be granted : if a lease is granted after 1925 purporting to create a right of perpetual renewal it takes effect as a lease for 2,000 years. Tenants who on the coming into force of the Law of Property Act, 1925, were entitled to perpetual rights of renewal became entitled by virtue of section 202 of that Act as read with section 145 of the Law of Property Act, 1922, to a 2,000 years term in extinguishment of the right of renewal. The Law of Property Acts, 1922 and 1924, contain provisions for the payment of compensation to the landlord in respect of fines which would otherwise have been payable on renewal (see Law of Property Act, 1922, Fifteenth Schedule, paragraph 12 : Law of Property (Amendment) Act, 1924, Second Schedule, paragraph 4).

LAW REFORM, CONSIDERATION AND EQUITY.

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The latest report issued by the Law Revision Committee ("Statute of Frauds and the Doctrine of Consideration"—Cmd. 5449) contains recommendations of a startling and far-reaching character. Nearly two hundred years ago, in *Pillans* v. *Van Mierop* (*a*), Lord Mansfield held that a written promise requires no consideration. He said (*b*): "I take it that the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing . . . there was no objection to the want of consideration." As is well known, his decision was overruled by the House of Lords in *Rann* v. *Hughes* (*c*). The Law Revision Committee now recommends (para. 29) that the law be altered and that no valuable consideration be required "if the promise or offer has been made in writing by the promisor or his agent". Such writing would not need to be signed.

Among the other changes recommended by the Committee are (i) that valuable consideration should suffice whether it be past or present (para. 32) and whether or not it moves from the promisee (para. 37); (ii) that valuable consideration should be deemed to exist (a) in agreement by a creditor to accept a lesser sum in discharge of his debt (para. 35), and (b) although the agreed consideration is something which the promisee is already bound to do (para. 36); (iii) that a promise should be enforceable (whether or no there is writing or consideration) if the promisee alters his position to his detriment in reliance on the promise and the promisor knew or ought to have known that the promisee would rely on it (para. 40); (iv) that a contract which expressly purports to confer a benefit directly on a third party should be enforceable by him in his own name, subject to any defences which would be valid between the contracting parties and subject to their right (unless otherwise agreed) to cancel it by mutual consent at any time before he has adopted it (para. 48); (v) that

(*a*) (1765), 3 Burr. 1663.
(*b*) *Ibid.*, at p. 1669.
(*c*) (1778), 7 T. R. 350.

section 4 of the Sale of Goods Act, 1893, and so much as remains of section 4 of the Statute of Frauds, 1677, be repealed (para. 16). The Committee's terms of reference did not include section 40 of the Law of Property Act, 1925; the present prospect, therefore, is that contracts to dispose of land will still require proof in writing (in the absence of part performance) whether or not supported by valuable consideration (*cc*).

It is evident enough that these sweeping proposals, if adopted, will involve fundamental changes in the common law of contract. The main purpose of this article, however, is to consider some of their less obvious implications and to note their impact upon certain equitable doctrines.

1. *Intention to create a relationship binding in law.*

It appears from the Committee's report that, although many of its members favour the total abolition of the doctrine of consideration (para. 27), the proposal to retain it in a modified form as a requirement of unwritten promises rests on the view that the presence of consideration may be regarded as some evidence that the parties intended to create a relationship binding in law (para. 28). But apparently it is not intended to alter the existing rule that the presence of consideration does not convert a social engagement into a legal contract (*d*); and the Report (para. 30) emphasises that written promises—though requiring no consideration—will not be binding unless the Court finds that the parties intended to create a legal obligation. One can well imagine that when it comes to pass that writing suffices in lieu of consideration, and even past considerations are sufficient, the plea that no legal relationship was intended will be much more frequent than it has been in the past. At present it is not easy to advise a client who states that he made a certain promise with no thought of incurring any legal obligation; and one can but hope that the Courts will take an early opportunity of elucidating the precise circumstances in which such defences are available (*e*). That part of the Report (para. 40) which recommends that a promise

(*cc*) The proposal that a "written" promise shall not require consideration (para. 29) appears to contemplate something more than the evidentiary writing required by section 40 of the L. P. Act. (see para. 30). Thus, a spoken promise subsequently acknowledged in writing would not, it seems, suffice. Hence, one cannot safely assume that whenever a promise is sufficiently evidenced in writing for the purposes of section 40 no consideration will be required.

(*d*) See paras. 20, 30.

(*e*) The present tendency of the law seems to be that in a social or domestic transaction there is a presumption of fact that the parties do not intend legal consequences to follow (see *Rose and Frank Co.* v. *Crompton Bros., Ltd.*, [1923] 2 K. B. 261 (C. A.), *per* Scrutton, L.J., at p. 288); and presumably a converse presumption arises in business transactions.

should be actionable if the promisor knows or ought to know that the promisee will rely upon it does not explain whether it is intended to cover cases in which the promisor did not intend to bind himself in law; but if it does apply to such a case it may assist a promisee who suffers loss through relying upon a mistaken but reasonable belief that the promise was made with intent to create a legal obligation.

2. *Contracts for the benefit of Third Parties.*

As the Report points out (paras. 41, 42), the general rule whereby a stranger to a contract cannot sue upon it is already subject to important limitations. These include a number of statutory exceptions (such as sections 47 and 56 of the Law of Property Act, 1925) and the well-known line of cases in which a stranger to a contract has persuaded the Court to construe one of the parties as a trustee for him. The law as to when a trust will be so found "is uncertain and confused" (para. 44); the Committee accordingly recommends that a contract which *expressly* purports to confer a benefit *directly* on a third party shall be enforceable by him in his own name (para. 48). Here it may be noted that, although the Report states (para. 47) that "a third party right ought not to be acquired by implication", this appears to refer only to the proposed new statutory right of action, and there is no definite proposal to annul the existing system of raising a trust. It thus appears that, if a contract for the benefit of a third party does not "by its *express* terms purport to confer a benefit upon him *directly*", the Courts will remain free to decide that one of the contracting parties entered into the contract upon trust for him. To this extent, therefore, "uncertain and confused" though it be, the law may escape revision.

It is further recommended that the proposed right of a third party to enforce, in his own name, a contract which expressly purports to confer a benefit upon him shall be subject to cancellation of the contract (unless otherwise agreed) by mutual consent of the contracting parties at any time before he has adopted it. Here again the proposals appear to leave a possible loophole for the introduction of the trust concept; for the natural reaction of a Court of Equity may be to hold that the third party, though losing his statutory legal right, retains an equitable right to the benefits of the contract—assuming that the case is one in which a trust would ordinarily arise.

In short, it is suggested that equity will be inclined to intervene, where its rules allow, whenever the new statutory right is not

available. This was the course pursued by Courts of Equity in relation to assignments of choses in action when the assignee, whose rights lay originally in equity only, obtained from the Judicature Act a limited legal right to sue in his own name. And the possibility that similar developments may occur in the present case does not appear to have caused the Committee any anxiety; for, in support of this recommendation, the Report (para. 46) cites "the analogy of the assignment of rights", and describes section 25 (6) of the Judicature Act as a statutory provision which "has proved entirely satisfactory and has given rise to no criticism".

3. *Consideration and Equity.*

(a) *Specific Performance.*—One of the most fundamental of all equitable maxims is the rule "equity will not assist a volunteer". Thus, equity does not order specific performance of a voluntary promise, even though under seal (*f*). The new proposal (para. 29) is that when a promise is in writing "consideration should not be required", or (as summarised at p. 31 of the Report) that "an agreement shall be enforceable (*g*) if the promise or offer has been made in writing".

If want of consideration is the true reason for refusing specific performance of voluntary sealed promises at the present time, the proposed change may alter the rule, for a general prohibition against requiring consideration would appear to bind the equitable as well as the legal jurisdiction of the Courts. But there is some authority for saying that the real ground for refusing such relief is "want of mutuality" (*h*); and, if this is so, presumably the proposed change would not remove the difficulty. Indeed, if such a defence as "want of mutuality" exists, this defence (such as it is) will stand in the way on either view of the matter; and no unilateral promise—*e.g.*, to convey or settle land—can become specifically enforceable.

According to Fry (*i*), the doctrine of mutuality requires that "a contract to be specifically enforced by the Court must, as a general rule, be . . . such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them". If this doctrine is of general application it is difficult

(*f*) *Jefferys* v. *Jefferys* (1841), Cr. & Ph. 138; Ashburner, Principles of Equity (2nd ed.), p. 383.

(*g*) It is assumed that "enforceable" here does not necessarily imply *specific* enforcement.

(*h*) Hanbury, Modern Equity (2nd ed.), pp. 521, 531 *et seq.*; Anson, Law of Contract (17th ed.), p. 394. Cf. Ashburner, *op. cit.*, pp. 383, 405.

(*i*) Specific Performance (6th ed.), p. 219.

to see how one can evade it in such a case as is supposed. The promisor has promised to give. But what promise has been made to him? Unless one can be found, there is no mutuality; for no part of the "contract" is enforceable *by him*. And the proposal to allow force to past considerations (para. 32) would seem to be in the same plight. A possible solution might be to find a promise by the donee to accept the gift—such a promise, being supported by ample consideration, would be valid without writing.

A similar question appears to arise from the recommendation (para. 40) that "a promise which the promisor knows, or reasonably should know, will be relied on by the promisee, shall be enforceable [though unwritten and voluntary] if the promisee has altered his position to his detriment in reliance on the promise (*k*). Here, again, it would seem that the doctrine of mutuality might stand in the way of an action for specific performance against the promisor. But since specific performance is largely confined to contracts to dispose of land, and such contracts usually require writing by virtue of section 40 of the Law of Property Act, this recommendation will rarely affect land or specific performance; for if the promise is in writing (given any necessary intent to create a legal bond (*l*)) the promise is to be enforceable by reason of that (para. 29). Nevertheless, the question would become material in cases where an oral promise to convey land complies with section 40, *e.g.*, where subsequently acknowledged in writing (*ll*), or where section 40 is excluded by fraud or by part performance. Indeed, facts which would raise the equitable doctrine of part performance would also raise the situation described in this recommendation. Thus it would appear that the recommendation, if carried out, will overturn the ancient rule that part performance (as an alternative to the writing required by section 40) is effective only in equity, and gives no right to common law damages (*m*); and it may even extend the scope of the doctrine in other directions (*mm*). If this be so, the suggested reforms will encroach indirectly upon section 40 of the Law of Property Act, although they may make no frontal attack upon it.

The doctrine of mutuality, however, has been attacked very

(*k*) A somewhat similar doctrine already exists in equity, but operates only by way of "equitable estoppel"—the rule in *Ramsden* v. *Dyson* (1866), L. R. 1 H. L. 129. See Hanbury, *op. cit.*, p. 73.

(*l*) As to whether such intent is necessary under this proposal, see *ante*.

(*ll*) *Ante*, note (*cc*). Presumably when writing suffices in lieu of consideration, the rule that the memorandum required by section 40 must state the consideration will not apply to a voluntary promise.

(*m*) *Lavery* v. *Pursell* (1888), 39 Ch. D. 518, *per* Chitty, J., at p. 519.

(*mm*) The recommendation, as it stands, would enable the promisee to enforce the promise, if he has acted on it to his detriment, although his act was neither prescribed by nor unequivocally referable to the contract.

vigorously from high places, and its very existence has been questioned (*n*). Moreover it is significant, perhaps, in the matter under discussion, that the Judges were able to reason away its possible application to the Statute of Frauds (*o*).

(b) *Injunctions.*—It is said that equity's unwillingness to assist a volunteer precludes the Courts from issuing an injunction to enforce a voluntary negative promise, though under seal (*p*). Little has been heard of this point in modern actions on restrictive covenants. Nevertheless, the original justification for the rule in *Tulk* v. *Moxhay* was that the covenantor obtained the land at a lower price by entering into the covenant (*q*); apparently, therefore, the rule requires a covenant for value. The changes proposed by the Revision Committee will render written promises "enforceable" though consideration is lacking. Hence, if "enforceable" implies enforceable in equity as well as in law, the possibility that equity will not enforce a voluntary negative covenant will disappear.

A licence to enter upon land is revocable at law, whether or not granted for value or under seal, unless coupled with an interest (*r*). Equity, however, will issue an injunction to prevent a licensor from revoking a licence if he promised for value (expressly or by implication) not to revoke it. Such was the decision of the Court of Appeal in *Hurst* v. *Picture Theatres* (*s*). It has been heavily criticised (*t*); but it has never been overruled, and the actual decision (despite some of its *dicta*) seems consistent with general principles (*u*). The new proposal, that written promises should be "enforceable" without consideration, heralds a new form of irrevocable licence—the licence in writing. But here, again, the result depends upon whether writing in lieu of consideration is (as would appear) to be sufficient in equity as well as in law.

(*n*) See Ashburner, Principles of Equity (2nd ed.), pp. 404, 405; also Hanbury, Modern Equity (2nd ed.), pp. 521, 531 *et seq.*, where the authorities are assessed.

(*o*) See *Flight* v. *Bolland* (1828), 4 Russ. 298, 301. It was said that the statute required only a memorandum signed by the party to be charged and that the plaintiff, by filing his bill in equity, in effect rendered the remedy mutual.

(*p*) Ashburner, *op. cit.*, p. 383, citing *Jefferys* v. *Jefferys* (1841), Cr. & Ph. 138.

(*q*) *Tulk* v. *Moxhay* (1848), 2 Ph. 774, 778; *Cato* v. *Thompson* (1882), 9 Q. B. D. 616, 618.

(*r*) *Wood* v. *Leadbitter* (1845), 13 M. & W. 838.

(*s*) [1915] 1 K. B. 1.

(*t*) See references given by Hanbury, Modern Equity (2nd ed.), pp. 118—120.

(*u*) If equity would give an injunction to prevent the breach of contract (see Pollock, 31 L. Q. R. 9), equity considers to be done already that which ought to be done. The licence is therefore irrevocable in equity. Unfortunately the *dicta* include attempts to show that the licence there was "coupled with an interest".

Furthermore, it may be that the writing will preclude revocation only if it contains an *express* promise not to revoke, for the Committee recommends (para. 30) "that the entire promise should be in writing, and that no other evidence of the promise, whether in writing or partly in writing and partly oral, should be considered sufficient". Whether this would preclude the Courts from enforcing the promise not to revoke *implied* in a written licence for a stated period is not entirely clear.

(c) *Imperfect Gifts.*—Perhaps the chief application of the rule that equity will not assist a volunteer is expressed in the maxim "equity will not perfect an imperfect gift". A voluntary settlement of property is ineffectual unless the settlor has either transferred the property to the objects of his bounty or to trustees for them, or has declared effectively that he himself holds it upon trust for them (*x*). Once the donee's title is perfected, all is well (*y*); but if he seeks the aid of the Court to perfect the gift the Court will refuse (*z*). Such aid could be given only on the ground that the settlor has become bound by an equitable obligation in favour of the plaintiff; and, failing a declaration of trust, no such obligation can arise in favour of a volunteer. If the plaintiff has given valuable consideration, or is within the marriage consideration of an ante-nuptial marriage settlement (*a*), well and good; otherwise he is a volunteer, and neither deeds (*b*) nor considerations of natural love and affection (*c*) can alter the fact. These rules have been applied, *inter alia*, to covenants to settle after-acquired property, to settlements of expectancies, and to gifts defective in form. It remains to consider how, if at all, they will be modified by the changes recommended by the Law Revision Committee.

In the first place, it should be noted that the proposals to dispense with consideration postulate a written "promise" (para. 29, and p. 31); thereupon the "agreement" is to be "enforceable" (p. 31), and no consideration will be required (para. 29). A covenant to settle after-acquired property is clearly a written promise for this purpose. It would therefore appear that the lack

(*x*) *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, 274, *per* Turner, L.J.

(*y*) *E.g.*, if he become the donor's representative (*Re James*, [1935] 1 Ch. 449), or obtains the property by the donor's authority *inter vivos* (*Re Bowden*, [1936] Ch. 71), or if he is in possession in circumstances which estop the donor from contesting his right (*Ramsden* v. *Dyson* (1866), L. R. 1 H. L. 129).

(*z*) *Meek* v. *Kettlewell* (1842), 1 Hare 464; explained by Bennett, J., in *Re Bowden*, [1936] Ch. 71, 75.

(*a*) *Pullan* v. *Koe*, [1913] 1 Ch. 9; or a settlement in pursuance of an ante-nuptial agreement, *Re Holland*, [1902] 2 Ch. 360.

(*b*) *Milroy* v. *Lord* (*supra*).

(*c*) *Antrobus* v. *Smith* (1806), 12 Ves. 39.

of beneficiaries within the marriage consideration (if any) will cease to bar other beneficiaries from enforcing such a covenant (*d*). It is not so clear, however, that a defective conveyance or settlement, or an attempt to convey an expectancy, is a "promise" or "agreement" within the meaning of the Report. Yet it would seem that Courts of Equity, when enforcing a defective conveyance for value, do so by construing it as an enforceable promise to convey (*e*). Consequently, if equity is prepared to accept writing as an alternative to consideration, written gifts ineffective at law may be construed as promises to give (*f*). Thereupon, assuming that a promise thus implied from a written gift is sufficiently "in writing" for the purposes of the Report (*g*), an "enforceable" contract will arise, and defective gifts in writing may thus become enforceable in equity. In other words, if the gift is supported by writing, the donee will no longer be a "volunteer".

There are *dicta*, it is true, that equity does not assist defective conveyances for value unless the transaction is remedial by an action of specific performance (*h*); but the weight of authority favours the view that the only essential factor is an adequate identification of the property (*i*). Consequently, the effects of the projected reform should not be limited by those rules which restrict the specific enforcement of contracts; accordingly such questions as the rarity of the subject-matter and the presence of mutuality (*k*) should not stand in the way. Thus, by virtue of the proposed changes, even a voluntary conveyance of mere chattels by an unsealed writing may suffice to pass an equitable, if not a legal (*l*), title.

(*d*) Cf. *Re Plumptre's Marriage Settlement*, [1910] 1 Ch. 609; *Pullan* v. *Koe* (*supra*). The proposal to allow a third party to sue in his own name upon a contract which purports by its express terms to confer a benefit *directly* on him (para. 48) would seem inapplicable when (as is usual) the covenant to settle is made with the trustees of the settlement and envisages a benefit by way of trust.

(*e*) *E.g.*, *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523, 543, *per* Lord Macnaghten (future property and expectancies); *Parker* v. *Taswell* (1858), 2 De G. & J. 559, *per* Lord Chelmsford (unsealed lease).

(*f*) It may be that equity does not raise a promise in a defective voluntary conveyance; if so, imperfect written gifts may remain imperfected. On the other hand, the present position may rest on the fact that though a promise is inherent in the gift it is not at present enforceable for want of consideration; if this be the correct view the proposed reform will make such promises enforceable.

(*g*) It is not clear whether the recommendation in the Report (para. 30) that "the *entire* promise should be in writing" is intended to exclude promises implied from a written document.

(*h*) In *Re Wait*, [1927] 1 Ch. 606 (C. A.) this view was taken, *semble*, by Hanworth, M.R., and by Atkin, L.J.; but it was vigorously denied both by Sargant, L.J. (*ibid.*) and by Pollock (43 L. Q. R. 295).

(*i*) *E.g.*, *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523, *per* Lord Macnaghten, at p. 543; and see previous footnote.

(*k*) *Ante*, *s.t.* "Specific Performance".

(*l*) No legal title passes at present under the Sale of Goods Act, 1893, unless there is "a money consideration called the price" (s. 1). If such consideration exists, the Act applies whether the transaction is framed as a transfer or as an

(d) *Resulting Trusts.*—Another equitable doctrine concerned with consideration is that of Resulting Trusts. When property is conveyed, *inter vivos* and without consideration, to one who is a stranger (*i.e.*, one to whom the grantor is neither husband, parent, nor *in loco parentis*), or is conveyed to a stranger jointly with the grantor, a presumption is said to exist that a resulting trust arises. Accordingly, unless a contrary intention can be shown, the grantor retains the beneficial interest in the property The precise limits of this doctrine are very doubtful (*m*). As regards pure personalty the presumption, though applicable to a joint conveyance, seems never to have been raised from a conveyance to a stranger alone (*n*). And, as regards land, section 60 (3) of the Law of Property Act, 1925, is so vaguely expressed that one cannot say with confidence that it has ousted the presumption or has clarified the position.

The proposed reforms will not, it is feared, remove this sore affliction from voluntary conveyances; for the fact that written voluntary promises are to be enforceable can hardly affect the position. The presumption of a resulting trust is already rebuttable by adequate evidence that the donor intended the gift to carry the beneficial interest (*o*); consequently any express promise by him to that effect is already effective. The presumption is excluded also if the conveyance is for consideration (including such meritorious consideration as will raise a presumption of advancement); for the presence of consideration suggests that no resulting trust was intended (*p*). Here, apparently, equity regards the presence of consideration as evidencing the grantor's intentions —not as raising any *promise* or *contract* by him. Hence, if equity does not proceed in such cases by implying any promise, the proposal to make written promises enforceable cannot affect the matter.

The proposed reform is not (it seems) that written conveyances shall be deemed to have been made for value, but merely that

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agreement to transfer the property in the goods. The Report does not state whether it is contemplated that writing will suffice, in lieu of price, for the purposes of this Act. If a "price" is to remain essential, a written promise to make a gift of chattels will become an "enforceable" contract (para. 29), but no legal title will pass under the Act of 1893. But apart from the Act, a contract for value (though not money) may pass the legal title at common law (2 Bl. Comm. 446-7, 448); hence if writing becomes an effective alternative to consideration it is conceivable that even the legal title will pass under a written gift of chattels.

(*m*) See Hanbury, Modern Equity (2nd ed.), pp. 210 *et seq.*; Keeton, Trusts, pp. 163 *et seq.*; Ashburner, Equity (2nd ed.), pp. 106 *et seq.*

(*n*) Hanbury, *op. cit.*, pp. 212-3.

(*o*) *Standing* v. *Bowring* (1885), 31 Ch. D. 282, 287, *per* Cotton, L.J.

(*p*) See *Crabbe* v. *Crabbe* (1834), 1 M. & K. 511; *Fowkes* v. *Pascoe* (1875), L. R. 10 Ch. App. 343.

written promises shall be enforceable without consideration. Hence, although it is possible that the custom of finding a promise in a *defective* conveyance may enable equity to perfect an imperfect written gift (*q*), the lack of such a custom in relation to conveyances *effective* at law deprives the latter of any prospect of liberation from the toils of the resulting trust.

4. *Voluntary Conveyances and Statute-law.*

For the same reason, the proposed reforms are not likely to touch the majority of the statutory provisions concerned with voluntary conveyances—*e.g.*, as to implied covenants for title (*r*), and the rights of creditors and others to avoid a voluntary conveyance (*s*). The proposals are primarily concerned with promises, not with conveyances. Such conveyances are ordinarily under seal; consequently, any promises contained therein are already "enforceable" (in law, if not in equity) against the promisor —though not necessarily against his trustee in bankruptcy (*e.g.*, covenants to settle after-acquired property (*t*)). No doubt the proposal to make written promises enforceable is bound to affect the rights of a bankrupt's creditors, for it will increase the number of claims provable in bankruptcy. But whether it is intended to exclude from the statutory provisions for avoiding a voluntary settlement so much of the settlement as consists of written promises (*e.g.*, to settle after-acquired property) is not altogether clear.

It thus appears that the effects of the proposed changes in the doctrine of consideration may well extend far beyond the confines of the common law of contract. Until the proposals are embodied in statutory form, their effects cannot, of course, be accurately assessed. Much will depend upon the precise extent to which written voluntary promises are to become "enforceable"; whether promises implied in a written document are to be included; and whether written voluntary promises are to be treated for all purposes as though consideration has been given. And, though such questions be answered, it will hardly be possible to predict the full consequences even of this partial eradication of the doctrine, so widely rooted are the notions of consideration in the several fields of English law.

(*q*) See footnote (*f*), *ante*.
(*r*) L. P. Act, 1925, s. 76.
(*s*) L. P. Act, 1925, ss. 172, 173; Bankruptcy Act, 1914, s. 42.
(*t*) See Bankruptcy Act, 1914, s. 42 (1), as to the avoidance of *voluntary* settlements by a trustee in bankruptcy, and compare s. 42 (2) as to the limited enforceability of covenants to settle contained in settlements in consideration of marriage (here a right to prove is given, but only after all claims for money or money's worth have been satisfied).

CONVEYANCING WITH REGISTERED LAND.

By F. R. Crane, LL.B., Solicitor.

I.—Introduction : The Register.

The chief feature of the Annual Report for 1936 of the Chief Land Registrar (noted *ante*, Vol. I, p. 380), was the increase in the number of registered titles, particularly in the non-compulsory areas. Furthermore, as from January 1, 1937, registration of title on sale of land in Middlesex has become compulsory. Practitioners may therefore expect to have to deal with registered land with increasing frequency.

This series of articles is to deal with everyday Land Registry law and practice—the straightforward cases which may present variations but no exceptional difficulties. No attempt will be made to delve deeply into the intricacies of the Act, in regard to which readers are referred to detailed works such as Brickdale on the Land Registration Act or Potter on Conveyancing under the L. R. Act. Nevertheless it is hoped that practitioners will find that the normal transactions are adequately considered.

Something must first be said of the relationship between unregistered and registered conveyancing. It is a truism to say that the law of conveyancing (unregistered) is complementary to the law of real property and *vice versa*, and similarly the law of registered conveyancing is based upon both unregistered conveyancing and real property law. Primarily the Land Registration Act creates machinery to record the ownership of the legal estate and to facilitate its transfer, but there may be so many different interests co-existing in land that extreme simplification is not possible, even if it be desirable. It is submitted that it is inaccurate to regard registered conveyancing as a genus of its own, requiring only a limited amount of legal knowledge, and in these articles it will be of necessity assumed that the reader is conversant with the law of unregistered conveyancing and real property, the greater part of which remains applicable to registered land. These articles will therefore endeavour to explain the machinery of the Land Registration Act and to note how the law applicable differs from the ordinary law. Some of these differences are, of course, inevitable—for example, the method of

protection of interests under trusts is different because in registered conveyancing the system of entries on the register has been applied. In other cases, however, the distinctions seem to be arbitrary—for example, on the assignment of a lease of unregistered land certain covenants are implied, if the assignment be for valuable consideration, by section 77 (1) (c) of the Law of Property Act, 1925; section 24 of the Land Registration Act, however, provides for these implied covenants on every transfer, so that special provisions will need to be inserted in a transfer if the practitioner wishes to bring the two systems into line on this point.

Reference to sections of an Act, and to Rules, in these articles, mean the Land Registration Act and Rules unless otherwise stated.

What can be registered.

The Act divides interests in land into three classes: first, those interests in respect of which a proprietor may be registered (section 2 (1)) and which may for convenience be termed Registrable Interests; second, Minor Interests and third, Overriding Interests.

Registrable Interests are estates capable of subsisting as legal estates, since these are only ones in respect of which a proprietor may be registered (section 2 (1)). "Legal estate" is defined (section 3 (xi)) as those "estates, interests or charges in or over land subsisting or created at law which are by the Law of Property Act, 1925, authorised to subsist or to be created at law". This definition is somewhat misleading because the title to a legal charge or mortgage of registered land is not registered in the way now under discussion but instead the charge is protected by an entry on the mortgagor's title (see MORTGAGES); emphasis is given to this point by consideration of the three legal estates which are incapable of registration. These are: a lease for twenty-one years or under (section 19 (2)), a lease containing an absolute prohibition against assignment (sections 19 (2) and 22 (2)), and a mortgage where there is a subsisting right of redemption (section 8 (2)), although, as has been mentioned, the latter requires protection on the register.

A registrable interest, as above defined, once registered, can only be dealt with by means of the machinery of the Act (see TRANSFER ON SALE, *infra*).

Minor Interests are interests which, although not capable of being created or disposed of by a registered disposition, are liable to be overridden by a dealing by the registered proprietor unless they are protected on the register. In this connection actual notice

to a purchaser is immaterial (section 3 (xv)). Minor interests comprise two distinct classes: first, interests such as restrictive covenants, equitable charges, estate contracts, etc., corresponding closely to the matters registrable under the Land Charges Act, 1925, and second, beneficial interests under trusts. On a transfer on sale (see TRANSFER ON SALE, *infra*), the first class, if protected on the register, will normally not be overridden but will continue to be enforceable against the land in the hands of a purchaser, whereas the second class, if the formalities prescribed by the protecting entry are complied with (*e.g.*, the purchase-money is paid to two trustees) will normally be overridden, and the beneficial interests will be transferred to the proceeds of sale.

It will be noted that the effect of these entries on the register is generally speaking to give a purchaser notice of such matters as would concern him if the land were unregistered, and to leave him bound by such of these as can be enforced (if registered under the Land Charges Act, 1925), against a purchaser of unregistered land.

Overriding Interests are "all encumbrances, interests, rights, and powers not entered on the register but subject to which registered dispositions are by this Act to take effect" (section 3 (xvi)), and the list is set out in section 70 of the Act; the more important are easements and kindred rights, leases for twenty-one years and under, and rights of adverse possessors. For a full discussion see Potter, Conveyancing under L. R. Act, at pp. 10—17.

Emphasis should at once be laid on the fact that although overriding interests (when they exist) are usually of the utmost importance to a purchaser they do not appear on the register and therefore careful inquiry as to their existence is always essential. It cannot be too clearly stated that the register is not a complete record of all matters affecting the land.

Reference to overriding interests may, however, appear on the register in four ways, assuming that the Registrar has been satisfied as to the legal position:—

(1) The Registrar *may* make an entry of the existence of an overriding interest on the register of the dominant tenement (section 70 (3)), but in the case of easements, rights and privileges, only where they are appurtenant to the land and capable of existing as legal interests (Rule 257).

(2) On a first registration the Registrar *must* enter a note of any easement, right, privilege or benefit created by an instrument and *adversely* affecting the land (section 70 (2)).

(3) If the mines and minerals are excepted the Registrar *must* make an entry to that effect (Rule 196) and *may* make an entry

that the land is free of land tax or tithe annuity (section 70 (1), proviso).

(4) In other cases the Registrar *may* make an entry of the overriding interest against the servient tenement (Rule 41).

The exercise of the Registrar's discretion may vary; usually simple rights—for example, a right of way—will be entered on application, but more complicated matters, such as drainage plans, may not appear. Nevertheless, it would seem desirable to apply for the entry of any overriding interests immediately on their creation, if only to obviate the risk of their existence being forgotten on a future transaction.

The Register.

A specimen register is here appended, the entries in italics and square brackets showing the variations which will occur if the land is leasehold; these variations are also dealt with (*inter alia*) in the subsequent notes :—

(*a*) District Blankshire
Parish Middleton Title No. Bk. 1234

(*b*) A. Property Register.

Entry Number	
1.	The freehold [*leasehold*] land shown and edged red and numbered as below on H.M. General Map Blankshire.
(*c*)	Sheet X. Section 13B. Parcel No. 20 *or* (The freehold [*leasehold*] land shown and edged red on the filed plan No. Bk. 1234)
	Short Description 1 The Avenue, Middleton.
2.	[*Short particulars of the lease under which the land is held* *Date* — *Parties* — *Term* (*Years* — *From*) — *Rent* *31st Dec. 1925.* — *1. Alfred Brown* — *99* — *1st Jan. 1925* — *£5-0-0*] *2. Thomas Green*
(*d*)	Note :—The land coloured brown on the plan is subject to rights of way created by a transfer dated 1st January 1930 of the

land in this title by Thomas Green (Vendor) to Richard White (Purchaser).

B. PROPRIETORSHIP REGISTER.

(*e*)	1.		Title Absolute [*good leasehold*]
	2.		Proprietor :—Richard White of 1 The Avenue Middleton registered 2nd January 1930. Price paid £1000.

C. CHARGES REGISTER.

(*f*)	1.	2nd Jan. 1930.	The land is subject to the restrictive covenants (so far as they are still subsisting and capable of taking effect) contained in a Transfer dated 1st January 1930 between Thomas Green (Vendor) and Richard White (Purchaser) which covenants are set out in the Schedule hereto.
	2.	30th June 1935.	Notice of Memorandum of Deposit of Land Certificate dated 29th June 1935 to secure principal and interest as therein mentioned.
	3.		Proprietor :—Barclays Bank, Ltd.

The Schedule.

(particulars of restrictive covenants).

Notes:—(*a*) *District, etc.*—These three particulars are the identification marks of the title and must appear at the head of every document lodged at the Registry in relation to any interest affecting the land comprised in the title.

(*b*) *Property Register*—Like all Gaul, the register is divided into three parts, each supplying certain information.

(*c*) *Description of land.*—The Property Register states whether the land is freehold or leasehold, but the quality of the title is dealt with in the Proprietorship Register (see note (*e*), *infra*).

There is a reference to the land shown on the filed plan or Land Registry and also, as a rule, a short verbal description, although this may be omitted if the land is undeveloped.

The plan or Map is of the utmost importance in registered

conveyancing since by section 76 of the Act land is to be described by reference, with or without a verbal description, to a filed plan or the General Map, which are to be used for the identification of the land. The Rules (Nos. 272—285) elaborate this by providing that the Ordnance Map shall be the basis of all descriptions of registered land and that the Registry shall keep a General Map or filed plan, in either case based on the Ordnance Map, for the purpose of describing land. Unless there is a note, including the necessary particulars (see FIRST REGISTRATION, *infra*), that the boundaries are fixed, the filed plan or General Map only denotes the general boundaries (Rule 278), leaving the exact line—for example, whether the whole or part of a hedge, wall or road is included—undetermined; in fact, there is the somewhat Irish sub-section (4) to Rule 78 that: "This rule shall apply notwithstanding that the part or a whole of a ditch wall fence road stream or other boundary is expressly included in or excluded from the title or that it forms the whole of the land comprised in the title"!

Although a short general verbal description is almost always included (in addition to the reference to the land "shown and edged red on the filed plan", etc.), when the title is registered, yet it is also possible on application to have a detailed verbal description included, if the Registrar thinks fit. If this description conflicts with the plan the Registrar is to determine which is correct (Rule 285). It will be noted that the usual presumption in unregistered conveyancing, that a clear verbal description overrides a plan, does not hold good, and the desirability of extreme accuracy in all plans is obvious.

If the land is leasehold, Rule 5 (1) requires that there shall be entered in the Property Register "a reference to the registered lease, and such particulars of the lease, and of the exceptions or reservations therefrom (if any) as the applicant may desire and the Registrar approve; and a reference to the lessor's title if registered". Usually such particulars as are shown above are given. By this means a purchaser is given notice of all the contents of the lease, which forms part of the title and which he is entitled to inspect (section 110 (1)).

(*d*) *Note of Overriding Interest.*—It will be observed that as this only shows the existence of an adverse interest reference to the transfer will be necessary to ascertain full particulars.

(*e*) *Quality of Title.*—A freehold title may be (i) Absolute; (ii) Possessory; or (iii) Qualified.

(i) An Absolute freehold title (the most usual in freeholds) gives to the registered proprietor an estate in fee simple in possession with all rights, privileges and appurtenances belonging thereto

subject to any entries on the register and to overriding interests, and also, in the case of a first proprietor not entitled for his own benefit, subject to any minor interests of which he has notice, but the registered title is free from all other estates and interests (section 5; and see FIRST REGISTRATION, *infra*). In cases other than that of the first proprietor minor interests must of course be protected on the register.

(ii) Registration with a Possessory title does not affect the enforcement of any adverse rights existing or capable of arising at the time of first registration, but otherwise has the effect of an absolute title (section 6). In other words, the title down to the time of first registration is not guaranteed.

(iii) A Qualified title is equivalent to an absolute title, but the effect of some right or interest, arising either before a particular date or under a particular instrument, is excepted (section 7).

A Leasehold title may be (i) Absolute; (ii) Good Leasehold; (iii) Possessory; or (iv) Qualified.

(i) An Absolute leasehold title, which is comparatively rare, can only exist when the Registrar has investigated not only the title desired to be registered but also the title to the freehold and to any intermediate leases. It will then give to the registered proprietor the leasehold interests described, with all implied rights, etc., but subject to all implied and express covenants affecting the land, entries on the register (see next paragraph), overriding interests and, in the case of a first proprietor not beneficially entitled, minor interests of which he has notice (section 9).

(ii) A Good Leasehold title has the same effect as an absolute title except that any matters derogating from the power of the lessor to grant the lease are not affected (section 10). At present this is the usual registered leasehold title and of course corresponds to the normal case in unregistered conveyancing, where the title of the lessor will not have been investigated. Recently, however, the phrase "entries on the register" has acquired a new and more important meaning in connection with registered leasehold titles, as a result of the case of *White* v. *Bijou Mansions, Ltd.*, [1937] 3 All E. R. 269. There a proprietor, registered with a freehold absolute title subject to a restrictive covenant notice of which was entered in the charges register, granted a lease without disclosing the restrictive covenant, and the lessee was subsequently registered with a good leasehold title. On an action being brought to enforce the covenant against the lessee, Simonds, J., rejected the argument that section 44 (5) of the Law of Property Act, 1925, protected the lessee and held that, assuming someone was entitled to enforce the covenant, the lessee was bound by it, for by section 20 of the

L. R. Act a disposition, including a lease, of registered land takes effect subject to the entries on the register. The position in registered conveyancing, so far as entries against the lessor's title are concerned, of a lessee is therefore that which obtained under the Conveyancing Act, 1881—he takes a risk by not contracting to investigate the lessor's title. As a result of this case, it is submitted, practitioners acting for a lessee have every justification for insisting on investigation of the lessor's title, in which case they will probably be able to obtain for their clients an absolute leasehold title. It will also be noted that *White* v. *Bijou Mansions, Ltd.*, draws a distinction between registered and unregistered conveyancing, subject to the view (referred to favourably by Simonds, J.), that section 198 of the Law of Property Act, 1925, creates another exception to section 44 (5) of that Act, so far as interests registrable under the Land Charges Act, 1925, are concerned.

(iii) and (iv) Possessory and Qualified leasehold titles (sections 11 and 12) have the same effect as such titles in the case of freeholds with the additional qualification that the lessor's title has not been investigated.

The Registrar may in his discretion at any time or on any transfer on sale (if several years have elapsed since the registration he probably will) convert a possessory into an absolute or good leasehold title; after fifteen years in the case of freeholds and ten in the case of leaseholds he must do so provided the proprietor is in possession and there is no good reason to the contrary (section 77).

(*f*) *Entries in Charges Register.*—These examples (the first of which would not normally appear on a leasehold title) will serve to emphasise the point that further inquiry and inspection of documents will be necessary to ascertain (for example) whether the benefit of the restrictive covenants has been annexed so as to pass on an assignment without mention (see *Re Union of London and Smith's Bank*, [1933] Ch. 611, and TRANSFER ON SALE, *infra*).

Summary.

As has been pointed out above and elsewhere (*e.g.*, Potter, Conveyancing under L. R. Act), what is registered is not the land but the title thereto. Inspection of the register by itself, however, is not equivalent to investigation of title in unregistered conveyancing. By way of illustration, one may consider the position of a solicitor who has perused and examined an abstract of a good unregistered title to a fee simple; he might soliloquise thus:

"The vendor has the fee simple, so I need not worry about the legal estate, but it's subject to restrictive covenants, a mortgage, possibly some prescriptive rights, and the western boundary is not clear. I must raise requisitions on these points and search under the Land Charges Act." The register sets out this soliloquy but omits to tell the practitioner to raise requisitions, although the necessity for these remains; searches under the Land Charges Act, however, except for local land charges, are unnecessary, as these matters will appear on the register. The question of investigation of title will be dealt with more fully later (see TRANSFER ON SALE, *infra*), but the point is emphasised here because the view is sometimes expressed that registered conveyancing is merely a matter of filling up forms requiring little or no legal or technical knowledge. It is submitted that this attitude is wholly mistaken and that, apart from tracing the devolution of the legal estate, registered is just as difficult as unregistered conveyancing.

(To be continued.)

CONDITIONS OF SALE OF LAND.

By E. O. Walford, LL.D., Solicitor.

(*Continued from Vol.* 1, *p.* 325.)

In the last article reference was made to the provisions of section 191 of the Law of Property Act, 1925, which deals with the power of the Minister to apportion rentcharges where it is desired to effect a discharge of part of the land. The "Minister" referred to in that section is the Minister of Agriculture and Fisheries. Even where it is not proposed to discharge the land from the rentcharge, an apportionment can be effected under section 20 of the Landlord and Tenant Act, 1927, which provides that an order of apportionment of a rent reserved by a lease or any such other rent or payment as is mentioned in section 10 of the Inclosure Act, 1854, may be made by the Minister of Agriculture and Fisheries under sections 10 to 14 of that Act on the application of any person interested in the rent or payment or any part thereof or in the land in respect of which the rent or payment is payable without the concurrence of any other person. If a person entitled to the rent or any part of it so desires the Minister may impose a condition that any apportioned part which does not exceed £2 per annum shall be redeemed forthwith under section 191 of the L. P. Act, 1925. Section 10 of the Inclosure Act, 1854, applies to all annual or other periodical fixed rents or other certain payments. This section gave power to the Minister of Agriculture and Fisheries to apportion any such rent or payment among all the lands charged with the payment thereof; but only on the application of the persons interested in the lands in question *and* in the rent or other payment required to be apportioned.

It will also be noted that this section, unlike section 191 of the Law of Property Act, 1925, does authorise the apportionment of rent reserved by a lease, but like section 191 does not provide for apportionment of the covenants in respect of the portions to which the respective apportioned rents relate.

Section 77 of the Law of Property Act, 1925, provides by reference to Part VIII of the Second Schedule to that Act that on the conveyance for valuable consideration of part of land affected

by a rentcharge subject to a part (not legally apportioned) of the rentcharge covenants are implied to the following effect :—

(1) That the grantees and the persons deriving title under them will pay the apportioned rent and perform the other covenants contained in the deed creating the rentcharge so far as they relate to the land conveyed and will indemnify the conveying parties and their estates and effects from any breach so far as aforesaid.

(2) That the conveying parties and the persons deriving title under them will pay the balance of the rent (after deducting the apportioned rent and any other rents similarly apportioned in respect of land not retained) and will perform the other covenants contained in the deed creating the rentcharge so far as they relate to the land remaining vested in the conveying parties.

These implied covenants may be varied or extended and in particular it may be provided that (a) the land conveyed, or (b) the part of the land remaining vested in the covenantor shall stand charged with all money becoming payable under the implied covenant.

Registration of Rentcharges.

Although no other registration of rentcharges appears to be necessary, yet when land owned by a company is subjected to a rentcharge, or where land already subject to a rentcharge is acquired by a company, it seems that particulars should be lodged under the Companies Act, 1929. It is understood that this practice is not uniformly followed in or about Manchester, where rentcharges are very common; but it can be said with certainty that the official view of the Registrar of Companies is that a rentcharge is a "charge on land" within the meaning of section 79 of the Companies Act, 1929, and requires registration as such.

The registration of rentcharges on the occasion of the purchase of a new or existing rentcharge has already been shortly dealt with (Vol 1, p. 318).

Where land is acquired by a company subject to a rentcharge created by the conveyance to the company, or where land already owned by a company is or has been subjected after July 18, 1908, to a new rentcharge, section 79 of the Companies Act, 1929, applies, and particulars of the rentcharge must be registered within twenty-one days after the creation of the rentcharge. The liability to register particulars of the charge is that of the directors of the company, and penalties are prescribed by the section in the event of failure to effect the registration. Any person interested in the

charge can, however, register the particulars, and it is essential that the person entitled to the rentcharge should see that registration is effected since failure to register will render the charge void against the liquidator and creditors. Moreover in cases falling within this section the Registrar cannot extend the time, and an application to the Court will accordingly be necessary. The Court may then extend the time, but will only do so subject to any rights acquired by third parties against the land between the expiry of the twenty-one days and the time when the particulars are registered (see *Re Johnson & Co.*, [1902] 2 Ch. 101 (C. A.)), but this does not protect unsecured creditors who have not taken a charge on the land. Where, however, the order is made with the qualification above mentioned, and winding up commences before actual registration of the particulars, the charge will be void against the creditors, secured or otherwise : *Re Anglo-Continental Carpet Co.*, [1903] 1 Ch. 914.

According to the section, upon the charge becoming void " the moneys secured " become payable forthwith; but what exactly becomes payable in the case of a rentcharge it is impossible to say, since it has never been judicially decided that a rentcharge is registrable. It may be that the Court would hold that the moneys which become payable (if this result in fact does follow) are the moneys which would be payable upon a compulsory redemption of the rentcharge; but there is certainly no statutory provision which suggests this solution.

Where land is acquired by a company subject to an existing rentcharge, section 81 of the Companies Act, 1929, applies, and particulars of the charge must be registered within twenty-one days after the acquisition of the land is completed. In cases coming under this section the Registrar as a matter of practice allows the registration to be effected at any time notwithstanding that the twenty-one days' period has expired. The only effect of failure to comply with the section is that the directors and officers of the company are liable to a substantial fine. The charge is not avoided by non-registration.

Cases may arise in which it is difficult to determine whether particulars of charge should be registered. Thus a yearly rentcharge of £30 is charged upon land by Company A whilst owning this land. Company A then sells part of the land to Company B purporting to apportion £12 of the rentcharge to the part sold and the remainder to the land retained. In such a case it may be desirable for the purchaser to ascertain whether particulars of the rentcharge have been registered, for if Company A created the rentcharge after July 1, 1908, and the £30 has not been registered,

then the charge will be void against the liquidator and the creditors of Company A. The whole of the £30 will be recoverable from Company B, and therefore if Company A goes into liquidation owing to insolvency it is extremely likely that the rentcharge owner will require Company B to pay the whole rentcharge. If it were found that the original rentcharge was not registered it might seem desirable for the solicitor acting for Company B to point out to his clients this risk. It will, however, be noted that in addition to the implication by virtue of section 77 of the L. P. Act, 1925, of a covenant by Company A to pay the remainder of the rent, section 190 of the same Act enables Company B, if default is made by Company A in paying the rent, to distrain on the remainder of the land charged and also to take possession of the income in order to collect any sum paid by Company B on account of the remainder of the rent. As these rights are given against the land and not against the particular owner at the date when default is made, and the liquidator must necessarily dispose of the property in due course, it would seem, therefore, that Company B is not really concerned whether the original charge has been registered. Although in amplification of the covenant implied by section 77 of the L. P. Act, 1925, above mentioned, it may be declared that the remainder of Company A's land shall stand charged with the payment of all money which may become payable under the implied covenant, the Registrar refuses to accept particulars of such a charge. It is conceivable that such a charge might be useful in order to force a sale of vacant land in respect of which the right to distrain or the right to receive was of no immediate value. Admittedly in the event of a liquidation of Company A the liquidator would no doubt sell the land, when presumably any arrears in payment of the remainder of the rentcharge would be made good. Default might, however, occur at any time thereafter. Moreover it might not be desirable to wait for the owner of the remainder of the land, whether a company or an individual, to enter into liquidation or to become bankrupt. In view of the Registrar's attitude it is impossible to tell whether such a charge would be void against the liquidator and creditors of Company A, in the illustration given above.

Law Society's General Condition.

12.—(4) Where the property is freehold, and is sold subject to a perpetual or terminable rentcharge, and is also affected by an over-riding rentcharge which affects other property, but is not, in fact, paid by or on behalf of the vendor, then

if the over-riding rentcharge is referred to in the contract, as affecting the property, the following provisions shall apply :—

(i) No objection shall be made on account of the over-riding rentcharge, or of any covenants, conditions, or other provisions of a usual nature contained in the instrument, if any, creating the over-riding rentcharge, or of any powers or remedies of a usual nature for enforcing the said covenants and conditions, or compelling payment of that rentcharge;

(ii) No further indemnity against the over-riding rentcharge, or the breach of any of the said covenants and conditions, shall be required, besides the protection, if any, provided by law, and the assignment of the benefit of the indemnity, if any, to which the vendor may be entitled;

(iii) The purchaser shall conclusively assume that—

(a) the over-riding rentcharge has been paid, and

(b) the said covenants and conditions have been performed and observed, or that all breaches thereof have been effectually waived,

in every case up to the date of the actual completion of the purchase; and he shall not require the over-riding rentcharge to be apportioned.

The foregoing paragraph deals with the following type of case :—

(a) Blackacre and Whiteacre are owned by X and are subject to a rentcharge of (say) £100 per year payable to A.

(b) Blackacre is then sold by X to Y subject to a new rentcharge of (say) £50 per year payable to X, and X agrees to pay the "overriding rentcharge", charging it exclusively on Whiteacre.

(c) Y then sells Blackacre to Z subject to the £50 rentcharge payable to X.

Under this condition Z cannot make objection (if the £100 rentcharge is referred to in the contract) on account of any special covenants or provisions of a usual nature contained in the instrument creating the rentcharge or any powers or remedies of a like nature for enforcing the covenants or for compelling payment of the £100 rentcharge. Generally conveyances creating ground rents contain covenants by the grantee of the land to erect and maintain buildings of a certain value upon the land, and it is quite usual

for such covenants to specify the type of building to be erected and maintained upon the land. Normally the covenants contained in the conveyance to X creating the overriding rentcharge would either be identical with those contained in the subsequent conveyance by X to Y, or the conveyance by X to Y will contain more stringent conditions than those contained in the conveyance to X; but this does not necessarily follow. It is therefore desirable when the draft contract discloses an overriding rentcharge to insist upon production before exchange of contracts, not only of the deed creating the rentcharge payable by Y to X, but also of the deed creating the overriding rentcharge payable by X to A. It is also material for Z, the purchaser of Blackacre in the illustration given above, to consider whether Whiteacre in fact constitutes a sufficient indemnity in respect of the overriding rentcharge. It must be remembered that there is nothing to prevent A from recovering the whole of the overriding rent from the owner of any part of the land, *e.g.*, by distress or appointment of a receiver. It is true that under section 190 of the Law of Property Act, 1925, if X fails to pay the £100 rentcharge and Z is compelled to pay it, he has the right to distrain upon or take the income of Whiteacre until any sums paid by him and the expenses incurred by him by reason of the default of X are satisfied; but the effectiveness of this remedy depends upon the adequacy of the income derived from Whiteacre.

Condition 12 (4) (i).

The question whether particular powers or remedies for enforcing the covenants and conditions contained in the deed creating the rent or for compelling payment of the rent are usual, or whether such covenants and conditions are themselves usual, may give rise to difficulty. It can hardly be said that an absolute right of re-entry (as distinct from a right of entry until satisfaction of arrears of the rent) was formerly a "usual" provision; but it would now seem to be usual. It would seem reasonable to construe this condition as referring to provisions which are (a) usual having regard to the subject-matter of the deed creating the rent, and (b) usual at the date of such deed; but as to (b) the point is not free from doubt.

Condition 12 (4) (ii).

It is to be noted that the remedies conferred by section 190 of the Law of Property Act, 1925, above mentioned, are exercisable by the owner for the time being of the various parts of the land affected by the rentcharge. As to the covenants for title and

indemnity implied under section 77 of the Law of Property Act, 1925, it is to be observed that the benefit of such covenants goes with the interest of the implied covenantee. The Act does not, however, appear to obviate the necessity of assigning the benefit of express covenants for indemnity.

Condition 12 (4) (iii).

The requirement that the purchaser shall conclusively assume that the overriding rentcharge has been paid, and that the covenants and conditions contained in the deed creating the overriding rentcharge have been performed, or any breaches waived, up to the date of actual completion seems rather stringent. Although such a condition is presumably binding at law upon a purchaser it seems clear that specific performance would not be ordered where it could be shown that the vendor was aware of arrears of the rentcharge or of breaches of the covenants or conditions in question (cf. *Beyfus* v. *Lodge*, [1925] Ch. 350). If, however, the purchaser claimed to be relieved from the contract on account of the existence of such arrears or breaches to the vendor's knowledge it is not certain that he would recover the deposit or his expenses of investigating the title, although since the passing of the Law of Property Act, 1925, the Court has under section 49 of that Act a discretionary power to award the return of the deposit and would it is thought exercise it in such circumstances; see *Hunt* (*Chas.*), *Ltd.* v. *Palmer*, [1931] 2 Ch. 287 (*The Conveyancer*, Vol. 1, p. 310). It is suggested, however, that a purchaser would be well advised to insist upon the qualification of this paragraph so as to provide that the purchaser is conclusively to assume the payment of the rentcharge and the performance of the covenants and conditions "unless the contrary appears". If the vendor objects to such an addition it is submitted that no objection should be taken to inquiries by the purchaser before contract, and the purchaser's solicitor should therefore inquire the name and address of the owner of the overriding rentcharge in order that it may be ascertained whether the rentcharge has in fact been paid to date. A perusal of the terms of the deed creating the overriding rentcharge and an inspection of the property will normally be sufficient to enable the purchaser to determine whether the covenants and conditions in the deed have been complied with; but as to other matters, such as evidence of the approval of plans of buildings erected on the land, inquiry of the rentcharge owner before contract should dispose of these matters. If this condition is accepted, even with the addition suggested above, any such matters as last mentioned would have to be disposed of by inquiry

of the rentcharge owner after contract and before completion of the purchase.

It will be seen that this paragraph of Condition 12 does not state whether the purchaser is entitled to an abstract or copy of the deed creating the overriding rentcharge. Under Condition 12 (2) where the property is sold subject to a perpetual or terminable rentcharge the abstract is to include the instrument creating the rentcharge, but in the case now being dealt with the property is not being sold subject to the overriding rentcharge, but is rather being sold subject to an indemnity in respect thereof. However, it is submitted that a purchaser is, in the absence of any stipulation to the contrary, entitled to an abstract of the deed creating the overriding rentcharge since it constitutes a charge upon the land, and there would appear to be little doubt that it is as material a document as a legal mortgage or legal charge affecting the land.

Law Society's Condition.

13.—Where the property is enfranchised land (formerly of copyhold tenure) the following provisions shall apply :—

(1) Where the enfranchisement was effected otherwise than by the Law of Property Act, 1922, and under the contract the freehold title is to commence with the deed or award of enfranchisement, the purchaser shall take subject to such rights (if any) of the Lord in respect of mines, minerals and other matters as were not granted or released by the deed or award, and no objection shall be taken on the ground that any such deed contains no re-grant of commonable rights.

Prior to the Conveyancing Act, 1881, a purchaser under an open contract for the sale of former copyhold land was generally entitled to call for the title to the freehold in cases where the enfranchisement was voluntary; but by section 3 (2) of that Act this right was taken away. The position is not altered by the Law of Property Act, 1925 (see section 44 (6)). The general practice is to accept the statutory position in this respect. The purchaser is, however, entitled to require title to be shown to the copyhold interest, such title to commence with a good root of title dated at least thirty years before the contract. At common law sixty years' title was required to be deduced, but by virtue of the Vendor and Purchaser Act, 1874, the period was reduced to forty years and is now further reduced to thirty years by

section 44 (1) of the Law of Property Act, 1925. Where the enfranchisement was effected upwards of thirty years ago the title will of course commence with the enfranchisement deed or award.

Sub-clause 1 of the Law Society's Condition applies not only to cases in which the enfranchisement has taken place by deed but also to cases in which the enfranchisement has taken place under the Copyhold Acts, (either voluntarily or compulsorily), or under the provisions of the Settled Land Act, 1882 enabling limited owners to enfranchise settled land.

Under section 1 of the Copyhold Act, 1894, the copyhold tenant or the lord of the manor might give notice requiring the enfranchisement of the copyhold; but by virtue of section 3 the tenant could not do so unless he had paid all fines, heriots, etc., due. In the case of a compulsory enfranchisement effect was given to the enfranchisement by an award (section 10).

Voluntary enfranchisement was made by deed, and execution of the deed by the Board of Agriculture and Fisheries was by virtue of section 61 conclusive evidence of compliance with the terms of the Act. Enfranchisement under this Act, whether compulsory or voluntary, left the land subject to all rights of common, mortgages, leases, the lord's right of escheat for want of heirs, as if the land had not been enfranchised, but, the tenure becoming freehold, descent according to gavelkind, borough English or other customary mode of descent no longer applied to the land, and customs relating to dower, freebench and tenancy by the curtesy or other customs also ceased to apply to the land (section 21).

By section 22 commonable rights are preserved to the commoner. The respective rights of the lord and tenant as to minerals and mines are unaffected by such an enfranchisement, so that if the former copyholder had no customary or other right to work the mines all such rights would be reserved out of the enfranchisement, and if, on the other hand, the former copyholder had by custom or otherwise any such rights of working the mines, those rights would remain in him notwithstanding the enfranchisement.

At common law, however, the effect of enfranchisement by deed was slightly different for the enfranchisement extinguished all customary and commonable rights attaching to the copyhold interest such as commonable rights of pasture and estover unless provision to the contrary was made in the enfranchisement deed: *Barwick* v. *Matthews* (1814), 5 Taunt. 365; *Tilbury* v. *Silva*, 45 Ch. D. 98.

The object of the provision in the Law Society's Condition precluding objection on the ground that there has been no regrant of commonable rights will perhaps be clear from the last observa-

tion but may best be explained by pointing out that voluntary deeds of enfranchisement either expressly grant the mines and minerals, and also all rights of common in respect of the common or waste lands of the manor to which the copyholder was at the date of the enfranchisement or would but for the enfranchisement be entitled, so as, in effect, to regrant these commonable rights to the tenant, or expressly reserve the minerals and extinguish the commonable rights. In the absence of such a regrant these commonable rights are automatically lost, so that strictly no reservation of them is necessary. The Condition therefore covers cases in which the commonable rights have been lost either by express extinction by the terms of the enfranchisement deed or by reason of the fact that such deed is silent upon the matter.

It should be mentioned that where copyholder A whose land is enfranchised has as against some other individual copyholder or copyholders a prescriptive right of way, it is not lost or affected by the enfranchisement of A's copyhold : 7 Rol. Abr. 933.

In all cases of voluntary enfranchisement prior to January 1, 1926, the purchaser's solicitor should satisfy himself that any sum payable on enfranchisement has been paid, as it forms a charge on the land under section 19 of the Copyhold Act, 1894.

Law Society's Condition.

13.—(2) Where the enfranchisement was effected by the Law of Property Act, 1922, then :—

(a) Whether the property is sold free from or subject to manorial incidents, no objection shall be made by reason of the existence of any rights preserved to the Lord of the Manor by paragraph (5) of the 12th Schedule to that Act, unless the contract states that those rights have been acquired or released;

(b) if the property is sold free from manorial incidents and from any liability for compensation in respect thereof, the title to the freehold interest, free as aforesaid, shall be deemed to be established by production of the agreement or the notice referred to in section 138 (1) of the said Act (if either of those documents exist) and of a receipt for the compensation money or other sufficient evidence that the compensation has been discharged or that no compensation is payable;

(c) if the property is sold subject to manorial incidents or to payment of the compensation for the extinguish-

ment thereof the vendor shall (if so required by the purchaser and at his expense) arrange for the extinguishment of the said incidents or the payment of the compensation on or before completion, but shall not be responsible for any delay in completion thereby occasioned.

Where the enfranchisement was automatically effected by the Law of Property Act, 1922, on the coming into force of the Law of Property Act, 1926, the results were shortly as follows (see L. P. Act, s. 128 and 12th Schedule) : The copyhold interest was enlarged into a freehold estate. Forfeiture for alienation without the consent of the lord of the manor, customary suits, services and fealty, the lord's right of escheat for want of heirs, customary methods of descent such as gavelkind and borough English, customs relating to dower, freebench, tenancy by the curtesy or other customs all disappeared. The right to dower freebench and tenancy by the curtesy of persons married before January 1, 1926, where the spouse has died before that date, was, however, preserved, and as to any right to freebench which has attached before January 1, 1926, and cannot be released by a devise or other disposition by the husband remains in force in equity.

This automatic enfranchisement did not in any way affect the following :—

(1) Commonable rights attaching to the former copyhold interest : 12th Schedule, para. 4.

(2) The respective rights of the lord of the manor and the former copyholder in respect of mines, minerals, quarries, and the like (12th Schedule, para. 5). The same paragraph, however, provides that notwithstanding the reservation of mines and minerals to the lord, the copyholder whose interest is enfranchised is to have full power to disturb and remove the soil for making roads or drains, erecting buildings, or obtaining water on the land.

(3) The rights of the lord in respect of fairs, markets, chase, warren, fishing and sporting : 12th Schedule, para. 5.

(4) Any liability then subsisting in respect of constructing, maintaining and repairing dykes, ditches, canals, sea or river walls, piles, bridges, levels, ways or other works required for the protection of any land within the manor or for abating nuisances therein (12th Schedule, para. 6). Application may be made for apportionment of such liability, and a charge upon the land to which it is

apportioned can and should be registered under the Land Charges Act, 1925.

Apart from these rights and liabilities there were, of course, other incidents of copyhold tenure which constituted a source of substantial revenue to the lord of the manor, and which could not justifiably be cancelled without reasonable compensation to the lord. These incidents were in the nature of quit rents, chief rents, fines, reliefs, heriots, customary dues, rights to timber, and forfeiture (except as to forfeiture on alienation without the consent of the lord). These rights remained in force until December 31, 1935, but unless extinguished meanwhile by agreement between the lord and tenant they were automatically extinguished on that date. If before that date a compensation agreement had been entered into, or the Ministry of Agriculture and Fisheries pursuant to notice given by the lord or the tenant, had fixed such compensation, then the position was conclusively determined. If, however, no such steps had been taken then on and after January 1, 1936, and until December 31, 1940, the position is as follows : The right of the lord to compensation remains and can only be extinguished by an application to the Minister of Agriculture and Fisheries under section 140 of the L. P. Act, 1922. This is not, however, the only way in which the matter can be dealt with. In the words of the Circular issued by the Ministry in 1935, and reproduced on p. 277 of the Law Society's Gazette for December, 1935, " Although after the end of this year a compensation agreement will not be possible, that is to say, an agreement as to compensation which would have the effect under the statute of extinguishing the manorial incidents, yet there appears to be nothing to prevent a lord and a tenant agreeing what the amount of compensation shall be in respect of manorial incidents which have been extinguished by virtue of the statute, and it would appear to be sufficient if the lord gives a receipt for the compensation when paid. If agreement can be reached it would not be necessary for either party to make an application to the Minister to determine the compensation under section 140 of the Act of 1922, and it will be open to the parties to agree which of them is to bear the stamp duty. If, however, a case were dealt with under section 140 the stamp duty would as a rule be payable by the tenant as well as all the costs and expenses.

It should be mentioned that compensation agreements or awards made prior to January 1, 1936, were exempt from stamp duty under section 139 (1) (vii) of the Act of 1922, but agreements or awards made after that date are so subject. Agree-

ments under hand appear to be liable to the fixed duty of sixpence, and agreements under seal to the fixed duty of ten shillings. The Inland Revenue authorities have expressed this opinion (see Law Society's Gazette for March, 1936) have also expressed the view that if the only written evidence is the receipt given by the lord on payment of the compensation, no further duty would be payable beyond the duty of twopence on the receipt.

So long as the manorial incidents remained unextinguished, *i.e.*, until a compensation had been concluded or until December 31, 1935, whichever was the earlier date, any assurance of the land or any interest in it was required to be produced to the steward of the manor within the period of six months from the date of the assurance, failing which it became void on the expiry of the six months' period (s.129). As manorial incidents became extinguished automatically on December 31, 1935, it has been suggested that an assurance made on or after July 1, 1935, could not become void under this section; but the object of the section is to ensure that the lord and the steward shall get their fines and fees on any assurance entitling them to such fine and fees, and the better opinion appears to be that the avoidance of the assurance would not be saved by the fact that the manorial incidents are automatically extinguished before the six months expire any more than it would be affected by a compensation agreement extinguishing the incidents *after* the assurance although before December 31, 1935.

This point should therefore be watched when investigating title to enfranchised land, and a condition precluding objection to the non-production to the steward of any assurance carefully considered before acceptance. If the legal estate were outstanding in this manner it must, however, be remembered that any condition precluding the purchaser from requiring it to be got in would be void : L. P. Act, 1925, s. 42 (8).

Condition 13 (2) (a).

The rights here referred to are sufficiently dealt with above; but it is material to point out that these rights may by agreement in writing between lord and tenant be treated as manorial incidents and extinguished as such, or alternatively that there shall be granted to the lord by way of compensation any estate or right of the tenant, or any right of way or other easement in or over the land affected for getting minerals, including any right to let down the surface; but the consideration in all such cases can only be fixed by agreement : section 138 (12) of L. P. Act, 1922.

Condition 13 (2) (b).

See the observations above as to the enfranchisement deed generally being the only evidence of the title to the freehold in cases of enfranchisement before 1926. Enfranchisement on January 1, 1926, being automatic there is of course no similar deed in such cases and the compensation agreement is the only document available to the vendor in cases of voluntary extinguishment of manorial incidents. The notice under section 138 (1) is no doubt referred to in this Condition because upon service by the lord or the tenant within ten years after December 31, 1925, of notice under this section requiring the compensation to be ascertained the manorial incidents are immediately extinguished, although the compensation remains to be determined. The lord was, however, not entitled to serve such a notice until after December 31, 1930. The reference in the Condition to the production of the receipt for the compensation money or other sufficient evidence is a reminder that the compensation money or rentcharge for securing annual sums in satisfaction thereof forms a first charge on the land : section 139 (1) (v).

In the absence of express stipulation where the manorial incidents have been extinguished then on a contract for sale of the freehold the purchaser cannot call for the title of the person making the compensation agreement or giving a receipt for the compensation money, and will not be affected with notice of anything which he might have discovered if he had stipulated that such title should be produced : section 138 (10).

If a purchaser in fact desires to inspect the Court Rolls after contract, presumably he has the right to do so under section 144, as a person interested in the land.

Condition 13 (2) (c) appears to require no comment.

Law Society's Condition.

13.—(3) As regards the title to the former copyhold interest—

(a) where under the contract that title is to commence with the will of a testator who died not less than twelve years before the date of the contract, the purchaser shall assume, unless the contrary appears, that the testator at his death was the duly admitted tenant and was beneficially seised for a customary estate of inheritance free from incumbrances, but in other cases where the said title commences with a will

the purchaser shall be entitled to be furnished at his own expense if he so requires with a statutory declaration by a competent declarant stating that the deceased was so seised;

(b) a purchaser shall assume that every surrender, admittance, or other customary assurance, expressed to be effected pursuant to a power of attorney was authorised by the power under which it appears, from the court rolls, to have been made; and, unless the power is in the possession of the vendor or his trustee or mortgagee, production thereof shall not be required.

As has been stated above the purchaser is entitled in the absence of express stipulation to require the copyhold title to be deduced for a period of thirty years.

As to paragraph (a) reference should be made to the observations already made in respect of Condition 11. Similar considerations apply to this paragraph.

As to paragraph (b) it is suggested that before this Condition is accepted inquiry should be made for particulars of any such surrender, etc., effected under power of attorney, and that if the surrender, admittance, or assurance was of comparatively recent date the Condition should not be accepted, and production of the power of attorney required.

(To be continued.)

NOTES OF RECENT CASES.

1. *CONVEYANCING AND PROPERTY CASES.*

Corrigendum—Willoughby v. *Eckstein.*—It is very much regretted that the note on this case (vol. 1 (N.S.), pp. 366-367) stated the decision erroneously. The question was whether an exception, " subject to the adjacent buildings or any of them being at any time or times rebuilt or altered according to plans as to light, elevation or extent and otherwise . . . approved of by the landlord ", was sufficient agreement in writing to prevent the acquisition by a lessee of a right to light by prescription under the Prescription Act, 1832, s. 3. Luxmoore, J., held that in the circumstances of the case it was a sufficient agreement, and not as stated in the note that it was insufficient. The importance of the case lies in the fact that there are very few decisions on this provision in section 3, and it is of obvious importance to lessors who own adjacent land, whether or not it is subject to existing leases.

It is convenient to note here that in arriving at his decision the learned Judge was concerned with all the facts of the case before him. On two of them he laid emphasis. First, the adjacent land in question was already held on lease from him at the date of the grant of the lease in respect of which prescription was claimed, and the lessor had no easement of light in respect of these premises. Secondly, the exception which constituted the agreement followed an earlier exception from the grant of any right of light or other easements over the adjacent land, but the grant was subject to all easements belonging to any adjacent property. Taken all together, the learned Judge thought that these facts constituted a grant by the lessee to the lessor during the full term of the lease to build on the adjacent land and an agreement that any light was to be permissive throughout the term. The case, therefore, must be regarded in the light of all its facts as a construction of the section upon its circumstances and not upon the actual words of exception. Practitioners may feel that more precise words might be employed in drafting.

It may be also convenient to call attention to *Hapgood* v. *Martyn* (1935), 51 T. L. R. 82 (noted *Conveyancer Mag.*, vol. 20,

p. 116), where in a conveyance of freehold not at that time built upon where an exception of " any easements or implied easements of light and air over any other land now or formerly part of " an estate of which the land formed part was held not to constitute a sufficient agreement to exclude a prescriptive right to light over adjacent land. The obvious connection of this with *Willoughby* v. *Eckstein* is the problem facing lessors on the grant of the first of several leases of dwelling-houses, where the houses have not been built. But it also emphasises the difficulty of depending upon general expressions rather than an express reference to the acquisition of prescriptive rights.

Assent—settled land—notice of defect in title—protection of purchaser.—Re Duce and Boot's Contract, [1937] 3 All E. R. 788, is one of the most important practical decisions on the 1925 Property Legislation for some time. By his will the deceased, who died in 1931, devised a dwelling-house to his son upon trust to allow the deceased's daughter to reside free of rent, rates and outgoings during her life or spinsterhood and to pay her £1 10s. per week during her life and subject thereto upon trust for himself absolutely; and appointed his son executor of his will. The son took out probate to the deceased's will and after completing the administration executed an assent in his own favour; such assent reciting the terms of the devise. Subsequently, by a deed of release the daughter of the deceased released her rentcharge of £1 10s., but the deed did not refer to her right to reside. Later, the son conveyed the estate in fee simple to a purchaser, who in turn entered into a contract to sell to the respondents to this vendor and purchaser summons. The respondents contended that no proper title had been deduced because the son had not sold in the course of administration and the assent did not vest a legal estate in him since the daughter was entitled to a vesting deed as estate owner under the Settled Land Act, 1925. The vendors contended that the respondents were protected by the Administration of Estates Act, 1925, s. 36 (7), by which the assent was sufficient evidence in favour of a purchaser that the son had the right to sell and that the will had not been abstracted. Bennett, J., held that a proper investigation of title, which included the assent reciting the devise, had brought to light the facts concerning the interest of the daughter and that she was at the date of the assent entitled to estate ownership under the Settled Land Act, which right, on the evidence, she had never released. Secondly, he held

that the expression "sufficient evidence" in the Administration of Estates Act could not be construed as "conclusive evidence", though this interpretation had been put upon it in some decisions but not others in connection with other statutes. He, therefore, said (at p. 795): "In my judgment, the meaning and effect of section 36 (7) are that a purchaser, when investigating title, may safely accept a vesting assent as evidence that the person in whose favour it has been made was the person entitled to have the legal estate conveyed to him, unless and until, upon a proper investigation by a purchaser of his vendor's title, facts come to the purchaser's knowledge which indicate the contrary."

The importance of this decision is apparent, but its application may lead to some difficulty. It will be observed that a purchaser will only be concerned with the propriety of the assent when upon a *proper investigation* of the title he is aware of the facts upon which it is made. It has generally been assumed that at least in the case of wills proved after 1925 a purchaser was not concerned with the contents of any will and that the will need not be abstracted. At the same time the probate of the will is in itself an instrument of title and therefore should properly be inspected by a purchaser: *Re Miller and Pickersgill's Contract*, [1931] 1 Ch. 511. It seems a little difficult on this ground alone to say that the purchaser should not look at the will, which is stitched into the probate, though by analogy to the old law trusts for sale this is not impossible; see *Re Chafer and Randall's Contract*, [1916] 2 Ch. 8; *Re Soden and Alexander's Contract*, [1918] 2 Ch. 258; and cf. Law of Property Act, 1925, s. 27 (1), where a purchaser is not concerned with the trusts of a trust for sale though embodied in the instrument creating the trust for sale. But the learned Judge was not called upon to decide whether a proper investigation of title would always include an abstract and inspection of the will under which the assent was made. Since the interests in a will operate only in equity it would seem consonant with the tenor of the property legislation that the will should not be inspected, and where, as in this case, the will creates a settlement a purchaser from an estate owner under a vesting assent is not concerned with the correctness of the details of the assent, whether or not he has notice of the trust instrument: S. L. Act, s. 110 (2). For example, had the son executed a vesting assent in his own favour and sold as estate owner under the Settled Land Act any notice of the contents of the will would apparently have been irrelevant, though had the assent contained a similar recital to that in the actual assent made in this case it is difficult to apply the Settled Land Act on the ground, perhaps, that the purchaser was wanting

in good faith : Settled Land Act, 1925, s. 117 (1) (xxi). In these circumstances it may be that the contents of a will proved after 1925 need not be abstracted and a purchaser will only be concerned with the accuracy of an assent where knowledge of the contents of the will is obtained *aliunde* from an investigation of title. Whether practitioners are entitled to rely upon this view of the decision must be doubtful and probably may well insist upon an abstract of the will and an inspection of its contents until the law is in a more settled state.

Had the son sold as executor before making an assent endorsed upon the probate it would not have mattered, at least so far as concerned the purchaser, that the administration had in fact otherwise been completed : Administration of Estates Act, 1925, s. 36 (8).

Registered land—restrictive covenants.—In *White* v. *Bijou Mansions, Ltd.* (1937), 53 T. L. R. 818, two points of considerable interest and importance were raised, namely, (i) whether restrictive covenants registered in respect of a freehold title under the Land Registration Act, 1925, were binding on a leaseholder whose lease was not made subject to the restrictions, and (ii) whether a person, not a party to an instrument, could take the benefit of a covenant not expressly entered into for his benefit. The second point is dealt with in the succeeding note.

The relevant facts with regard to the first point were that freehold land was purchased in 1890 by a conveyance containing restrictive covenants entered into by the purchaser with the vendor. Subsequently, the freehold was registered at the Land Registry and the restrictive covenants were noted in the Charges Register. Thereafter, a lease was granted subject to restrictive covenants which were less narrow than those imposed on the freehold. Simonds, J., held that the lessee was bound by the restrictive covenants affecting the freehold. The reasoning by which this decision was reached depended upon the interpretation put by the learned Judge on section 20 of the Land Registration Act, 1925, in combination with section 50 of the same Act. Section 20 renders any disposition (which includes lease) by a registered proprietor subject to all entries on the Register. Restrictive covenants noted on the Register are entries for the purpose of section 20 and, therefore, are binding upon the lessee, whether or not the lessee has inspected the Register. In the case of restrictive covenants this view is supported by section 50 (2) that persons deriving title under the registered proprietor are deemed to have notice of the restrictions.

It was argued that section 52, which renders dispositions subject to claims noted on the Register only so far as the same are not overridden, was effective to protect a lessee who is not entitled to call for his lessor's title and under section 44 (5) of the Law of Property Act, 1925, is not affected by incumbrances. The learned Judge, however, held that section 52 could be explained adequately by reference to cases such as those of an estate owner disposing of land under his statutory power and, therefore, not imposing such a restriction on the effect of section 20 as contended for by the defendant. The interests so indicated in the judgment are those minor interests, which under the Land Registration Act, 1925, are capable of being overridden whether or not they are protected by entries, such as cautions or restrictions, noted on the Register. It is respectfully submitted that this view of the relation between sections 20 and 52 is the correct one and consonant with the general provisions of the Act. The importance of the decision, therefore, goes beyond the problem of restrictive covenants, since there are a number of minor interests which may be protected on the Register and yet are not capable of being overridden by a disposition of the registered proprietor, such as contracts for sale, equitable charges, and bankruptcy inhibitions.

In these circumstances there seems to be good ground, wherever a lease of registered land is contemplated, to drop the existing practice of refusing to allow inspection of the title and to give an authority to search. The obvious objections to a lengthy deduction of title in the case of unregistered land do not apply to registered land and it may be that one of the conveniences of the system of registered titles will be the avoidance of the old unsatisfactory practice of a lessee taking valuable and expensive property involving considerable capital outlay at his own risk with regard to title. Furthermore, if the lessee is aware that his lessor is registered with an absolute title there is no reason why he should not also apply for an absolute rather than good leasehold title. The advantages of having an absolute title to the lease are manifest, particularly where a mortgage of the interest is contemplated.

Even where the title is not known certainly to the lessee there can be no objection to an application for an absolute title. Where the freehold title is registered as an absolute title there is ground for suggesting that the effect of sections 19 and 20 of the Land Registration Act is to give to the lessee the right to an absolute title. The Land Certificate of the freeholder must be deposited at the Registry in order that a notice of the lease should be put on the title, but there seems no reason why this should not be done.

Where an underlease is granted, the position does not appear to be identical. By virtue of section 23 (1) a sub-lessee takes subject to all express and implied obligations incidental to the estate transferred or created. It would, therefore, appear that whether or not an absolute title was granted to the sub-lessor the sub-lessee would take subject to all the restrictions or other charges imposed on the sub-lessor by reason of their being incident to the freehold estate. If the sub-lessor's title was good leasehold the sub-lessee would have no claim against the Registry for compensation, but if it was absolute there might be some right to compensation on the ground that the sub-lessee was entitled to rely upon the Register as disclosing all limitations to which the headlease was subject, as no doubt it would.

The practice with regard to leases of registered land has not been sufficiently considered with regard to obtaining the utmost benefits to be obtained from the provisions of the Land Registration Act. In some respects there should be greater differences in this practice from unregistered conveyancing than in transfers, but the tendency is to treat the position as having a contrary effect.

Restrictive covenants not in a building scheme—enforceability. —In *Re Ecclesiastical Commrs.*, [1936] Ch. 430 (noted *ante*, *The Conveyancer* (N.S.), Vol. I, p. 74), it was held that on a grant of freehold the grantor could impose a restrictive covenant in favour of assignees of land acquired from the grantor by an earlier conveyance, which would be enforceable by such assignees and their successors in title under the Law of Property Act, 1925, s. 56. The application of this section has been modified by two recent decisions. In *White* v. *Bijou Mansions* (1937), 53 T. L. R. 818, the plaintiff occupied adjoining premises to those on which an infringement of a restrictive covenant was sought to be restrained. The plaintiff acquired his land by purchase from the same vendors as the defendant but four years earlier in point of time. In the conveyance to the plaintiff conveying parties of the second part, who appear to have been interested in all the land under a contract for sale, entered into a covenant with the plaintiff that every further assurance of part of the land should contain a restrictive covenant limiting user to the purposes of a private dwelling-house only. In the conveyance to the defendant this stipulation was inserted, but no mention was made of the plaintiff or reference to the land already conveyed. As the case came before the learned

Judge no question of a building scheme could be raised because the issue was not contained in the pleadings and the learned Judge refused an application in the course of the trial to amend the pleadings to raise this issue; a point of practice which should be noted. It was, therefore, argued that in the light of the circumstances the covenant imposed in the defendant's conveyance was intended to enure for the benefit of the plaintiff, although he was not a party to the conveyance, under section 56. Simonds, J., held that section 56 could only operate to confer a right to enforce the covenant where, though not a party, he had been expressly mentioned in the instrument imposing the restriction. It would appear that it is not necessary to refer to the intended covenantor by name, but it will be sufficient if it is imposed for the benefit of persons entitled to land sufficiently defined; cf. *Re Ecclesiastical Commrs.* (*supra*).

In *Zetland* (*Marquess of*) v. *Driver*, [1937] 3 All E. R. 795, this section was litigated from a different angle. The plaintiff was the son of the first vendor and acquired title under a settlement, of which the vendor had been tenant for life and of which the plaintiff had become estate owner in due course. The defendant acquired title to the land, upon which the restriction was imposed by conveyance, from the original covenantor as purchaser from the vendor. Under a conveyance made in 1928 by the plaintiff's father, as tenant for life under the settlement, the purchaser acquired part of a large estate and entered into covenants with the intent to bind the property into whosesoever hands it might come and to benefit such parts of the land in the parish of Redcar then subject to the settlement (i) as should for the time being remain unsold, or (ii) as should be sold by the vendor or his successors in title with the express benefit of the covenant. The covenants were entered into with the vendor and there was no mention of his successors in title.

Bennett, J., held that the plaintiff could not enforce the covenants, apart from their running with the land in equity, because he was not the actual covenantee and, following *White* v. *Bijou Mansions* (*supra*), because he was not a person with whom the covenant was purported to be made. The learned Judge also held that the covenant did not run with the land in equity and was, therefore, unenforceable. The reason given for the latter part of the decision depended upon annexation to the dominant land and will be discussed later in this note.

It is thought that practitioners may have some difficulty in appreciating the relation between *Re Ecclesiastical Commrs.* (*supra*) and *Zetland* v. *Driver* (*supra*), because the plaintiff in the latter

case was entitled to the land remaining unsold and, therefore, would clearly be a person whom the covenant was contemplated to benefit just as the assigns of land formerly held by the Ecclesiastical Commissioners were held to benefit in the former case (which does not appear to have been referred to). A difference may be that, whereas at the date of conveyance in the earlier case the assigns were already ascertained and therefore capable of benefiting immediately, in the later case the plaintiff was an unascertained person. If this distinction is the correct one to draw section 56 affords some difficulty of interpretation, as indeed is pointed out by Simonds, J., in *White* v. *Bijou Mansions* (*supra*, at p. 821). The principle thus extracted might be expressed by saying that section 56 can only operate for the benefit of a person not a party to a conveyance provided that he (i) is adequately described; (ii) is in existence; and (iii) *presumably* is capable of taking the benefit of the covenant. Whether he must also be a party with whom the covenantor could validly enter into a covenant is a further difficulty in view of the law of capacity of parties. Two further points may be noticed. First, the learned Judge did not deal with the application, if any, of section 78 of the Law of Property Act, 1925, which provides that a covenant shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them. As the successor in title of the deceased covenantee the plaintiff would appear to have been named impliedly as a party taking the benefit of the covenant, but this does not appear to be the correct construction to put upon this section, the application of which it is not easy to perceive. Secondly, the learned Judge did not hold that in order that the benefit of section 56 may be enjoyed the covenant must run with the land. It is thought that in view of the second part of this decision it was open to the learned Judge so to hold, and there is some authority for this view; see *Dyson* v. *Forster*, [1909] A. C. 98; *Grant* v. *Edmondson*, [1931] 1 Ch. 1, neither of which cases appear to have been referred to in argument or judgment.

The reason why the learned Judge refused to hold that the covenants ran with the land was that the benefit, if it could be annexed at all, was annexed to the whole of the land retained by the vendor in the parish of Redcar, which extended over a very wide area. In view of the width of the area it was impossible that most of the land comprised in the dominant tenement could be affected in the least by anything done on the servient tenement, consequently the covenant could not be said to touch and concern every part of the dominant land and so did not run with it;

following Clauson, J., in *Re Ballard's Conveyance* (1937), 53 T. L. R. 793.

In *Re Ballard's Conveyance* (*supra*) the material facts, upon which the relevant part of the decision depends, were found by the learned Judge to be as follows. In a conveyance dated 1906 the purchaser entered into certain restrictive covenants for the benefit of the grantor, her heirs and assigns and successors in title, owners from time to time of the Childwickbury Estate, being land retained by the grantor. The Childwickbury Estate comprised land containing some 1,700 acres, far the largest part of which could not possibly be affected by a breach of the stipulations. The covenants did not represent covenants entered into in respect of a building scheme, but were made with the grantor in his capacity of owner of a particular property. The proceedings constituted an application under section 84 (2) of the Law of Property Act, 1925, for a declaration that the servient land was not bound by the restrictions to which the owners, being successors in title of the original grantor, were respondents. Clauson, J., held that on these facts the covenants did not touch and concern the dominant land as a whole and, consequently, were not binding on the servient land, since they did not run with the dominant land. The learned Judge said (at p. 796) that the construction of the documents was material to ascertain what land was intended by the parties to enjoy the benefit of the covenants, but on the question of whether the covenant is annexed to the land it is necessary first to ascertain in fact whether it touches or concerns that particular land. The learned Judge held that there was no authority by which he could hold that the covenant could touch or concern a comparatively small portion of the land to which it had been sought to annex it. Consequently, as the whole of the land could not benefit by the restrictions, they could not be said to touch and concern the whole of the area to which an attempt to annex them had been made and, as a result, the covenants did not run with the whole or any part of the dominant tenement.

These two cases just noted present another feature of the complex picture of covenants running with the land in equity. It appears to be now fairly clear that where the benefit of a covenant, capable of being annexed to the land, is expressly assigned (*Re Union of London and Smith's Bank*, [1933] Ch. 611) or, although not expressly assigned, has already been annexed to the parcel of land conveyed (*Drake* v. *Gray*, [1936] Ch. 451), the covenant will enure for the benefit of successors in title of the dominant land, although there is no building scheme. In the light of these two decisions just commented upon, however, the

problem of whether the covenant is capable of being annexed to the land is obviously a serious one. The covenantee must not only retain land capable of being benefited and which must be clearly defined (see *Torbay Hotel* v. *Jenkins*, [1927] 2 Ch. 225), and there must be an intention to benefit the land retained and not merely enable the grantor to dispose of the remainder of his property most profitably (*Re Sunnyfield*, [1932] 1 Ch. 79), but the area of the land to be benefited must also be capable of benefiting as a whole or the covenants can never be annexed and hence fail of this purpose *ab initio*.

Contract for sale—requisitions on title—Law Society's Conditions, cll. 9, 31.—*Re Ossemsley Estates, Ltd.*, [1937] 3 All E. R. 774, deserves close attention on the part of practitioners since it primarily relates to the time at which requisitions must be delivered and the manner in which objections must be made. The vendor issued a vendor and purchaser summons arising out of the following facts. By the contract for sale it was stipulated that the purchaser should take a title subject to a rentcharge and accept a fund in Court as sufficient indemnity. The property referred to in the stipulation was only part of the land contracted to be sold. Upon delivery of the abstract of title it was discovered that it related only to the land in respect of which the stipulation was made and required a further abstract in respect of the other land comprised in the contract. When this abstract was supplied it became apparent that the remainder of the land was also subject to the rentcharge and there was some doubt concerning the application of the indemnity fund to this part of the land, though in the Court of first instance it was held that it did apply and this view was accepted by the Court of Appeal. Within the fourteen days allowed by the Law Society's Conditions, which were incorporated, the purchaser made an objection to the title requiring the vendors either to procure an order exonerating the part of the property not included in the stipulation from the rentcharge or alternatively paying compensation equivalent to obtaining such an order. The reply to that requisition, dated May 19, 1936, was to the effect that the vendor had had to purchase subject to the condition, of which the purchaser was aware, and required the purchaser to accept the title subject to the rentcharge with the benefit of the indemnity. Nothing further was done by either side until July 13, when the vendor wrote to the purchaser requiring a draft conveyance. To this letter the purchaser replied that there was this

objection still outstanding and that he was advised that he could insist upon compensation unless the vendor was prepared to make a statement under section 50 of Law of Property Act, 1925, exonerating the land from the rentcharge.

The judgment of the Court of Appeal (affirming Clauson, J.), was delivered by Greene, M.R., and it was held that there was a misstatement in the contract which under clause 31 of the Law Society's Conditions called for compensation, but that the purchaser was precluded by clause 9 of those Conditions from requiring compensation, since, in the circumstances which had happened, he must be deemed to have accepted the vendor's reply to his requisition as satisfactory, because his observations on the vendor's reply had not been made within seven days of receipt.

It was argued that the vendor's reply was really a reply to observations made upon the reply to the original requisition requiring a further abstract. For such observations no time limit is laid down by the General Conditions. This view was not accepted because the first requisition required a complete abstract and no mention was made of the rentcharge. It was only after delivery of the complete abstract that the requisition raising the problem of the rentcharge was made.

This would appear to have been inevitable here, because until the delivery of the complete abstract there was no evidence of the defect. The time can only begin to run when the matter is disclosed on the abstract: *Re Cox and Neve's Contract*, [1891] 2 Ch. 109.

It should be observed that there is here no question of refusal to complete and an attempt to cry off the contract on the ground that the requisition goes to the root of title. It merely emphasises that an objection must be insisted upon if any claim is made for a defect or misstatement. It is insufficient to raise it and not object to an unsatisfactory reply within the allotted time.

Contract for sale—agent's commission where contract not signed.—Ronald Bampton v. *D. Garner & Sons, Ltd.*, [1937] 3 All E. R. 438, is yet another example of the liability for remuneration of agents where no contract for sale was completed. In this case, which turned upon some rather complicated facts, the position was that the agents were employed to sell the property subject to certain agreements for letting which were to be obtained by the vendor. A purchaser was introduced and the general negotiations were agreed, but no draft contract had been sub-

mitted, because the vendor's solicitors disapproved of the sale as being too advantageous to the purchaser. In these circumstances the sale went off. Hilbery, J., held, following *Trollope* v. *Martyn*, [1934] 2 K. B. 436 (noted *ante*, *Conv. Mag.*, vol. 19, p. 140, and 20, p. 87), that the vendor was liable for remuneration to the agents for introducing a purchaser willing to purchase on the terms laid down by the vendor, although subsequently the vendor withdrew on the ground that the terms were too advantageous to the purchaser. The learned Judge also held that, as all the terms of the contract had not been settled, and in particular the date for completion was not fixed, the Court could only award damages for depriving the agents of their chance of earning their commission, because it had not been proved as a fact that but for the defendant's act a binding contract would have been completed : *Trollope* v. *Caplan*, [1936] 2 K. B. 382.

It is to be observed that this case is rather a negative example of what will constitute "just excuse" for refusing to go on with a contract where a purchaser has been introduced. In this case the vendor himself would, it seems, have completed the contract but that he could not do so without the concurrence of his solicitor. Consequently he was not really a free agent in breaking off the negotiations. Presumably where the concurrence of a third party to a sale is necessary the agent should be informed that the sale can only be completed with that concurrence. In such circumstances refusal might be a "just excuse", but practitioners still await some more adequate explanation of this term.

Contract for sale—warranty and innocent misrepresentation.—*Terrene, Ltd.* v. *Nelson*, [1937] 3 All E. R. 739, emphasises that it is very difficult to obtain damages for an innocent misrepresentation made prior to contract on the ground that it is a breach of warranty. The purchaser had been told that an offer to rent part of the property had been refused, that an electric plant belonging to the premises produced a larger supply of electricity than that estimated, and that a sum was made by supplying water to tenants but omission was made of the amount paid to the water company for this supply. There was no question of any fraudulent misrepresentation. Farwell, J., held that no action lay after completion of contract by conveyance for damages on the ground of breach of warranty. The learned Judge said (at p. 743) : "In order that there may be a warranty, there must

be a clear intention on the part of both the parties to the principal contract that there is to be a stipulation of a kind which is collateral to the principal contract, and it is most essential, in a case of this sort, to distinguish between misrepresentation, on the one hand, and warranty, on the other hand. As was pointed out by Lord Moulton in his opinion in the well-known case of *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A. C. 30, many attempts have been made in the past (and here is, in my judgment, an instance of only another attempt) to get damages for breach of an innocent misrepresentation, which the Court will not allow under the guise of a breach of warranty. That is not open to any plaintiff, and, unless it can be shown on reasonably plain evidence, or be properly inferred from the evidence, that both parties intended that there should be a particular stipulation, such as that which I have indicated, no warranty can be proved, and no damages can be recovered for what is no more than an innocent misrepresentation."

Whether or not there is an intention that a representation should amount to a warranty depends on the whole circumstances of the case, but it would appear to be very difficult to infer a warranty apart from some express mention. Reference may be made in this connection to the case of *London County Properties* v. *Berkeley Property* (1936), 155 L. T. 190, in which, however, the defendants were ultimately held liable in fraud for the false statement of an agent.

Tithe—Tithe Act, 1936, *s.* 20—*arrears*.—By the Tithe Act, 1936, s. 20, arrears of tithe rentcharge arising before the appointed day but remaining unpaid became vested in the Tithe Redemption Commissioners, and under sub-sections 4 and 6 of that section a tithepayer may apply to a committee under that section to remit the whole or part of the arrears on the ground that his financial circumstances are such as to make such remission fair and reasonable, provided he serves a notice upon the Commission within one month of an application to recover arrears. In *Queen Anne's Bounty* v. *Tithe Redemption Commissioners*, [1937] 3 All E. R. 515, the issue was whether arrears in which a county court order for distress had been made were arrears within section 20. Bennett, J., held that all sums due in respect of tithe rentcharge were arrears within the section, whether or not they had been the subject of a county court order, but that the costs of obtaining any such orders were not arrears and consequently the right to recover them remained vested in the titheowners and did not vest

in the Tithe Redemption Commission. One of the results of this decision is that the tithepayer is entitled to apply for relief from payment of arrears, even if an order had been made in the county court to levy a distress for tithe. It is to be noticed that section 20 (4) requires any notice of application to be made within one month after notice by the Tithe Redemption Commission of their notice to enforce payment of arrears. Nor will relief be granted save where the tithepayer's financial position makes it fair and reasonable. Another result is the peculiar position of these costs of procedings which were more or less abortive. As they are not "arrears" within the meaning of the Act they are divorced from the amount payable in respect of arrears properly so called; there is no question of relief; and they must be enforced by the titheowner under the old Tithe Acts.

Will—construction—son dying before testator.—Re Hayter, [1937] 2 All E. R. 110, involved a short point. A testator gave his residuary estate to be divided between his two sons. One of the two sons had died in the lifetime of the testator, and though the report does not say so, it must be presumed that he left issue surviving the testator: Wills Act, 1837, s. 33. By his will the son appointed an executrix to whom he gave "everything I die possessed of". Clauson, J., held that the effect of the Wills Act, 1837, s. 33, was to pass the property of the deceased testator to the personal representative of the deceased legatee and that this property must be treated as an interest over which the legatee had a general testamentary power of disposition. He then held that the words "everything I die possessed of" constituted a general residuary gift and as such included the interest coming to the personal representative of the legatee on the death of his father. It was argued that the words constituted a specific gift, but the learned Judge held that at least in this connection they did not. The case is of interest primarily for the construction of the words "everything I die possessed of", because the capacity to dispose by will of property to which section 33 of the Wills Act, 1837, applied has already been generally accepted.

Will—gift to deceased cousin—lapse.—Re Cousen's Will Trusts (1937), 53 T. L. R. 490, also dealt with lapse where the death of the legatee prior to the testator had been anticipated, but where section 33 of the Wills Act, 1837, did not apply. Under his will the testator had left his residuary estate to the children of his late uncle with a proviso that if any child died in his lifetime "leaving

issue at my death the share in my residuary trust funds which such child would have taken if he or she had survived me shall be held in trust for his or her personal representatives as part of his or her personal estate". One such child died leaving issue, but under her will her husband was entitled to her estate. The husband also died in the lifetime of the testator. Farwell, J., followed *Re Bosanquet*, 113 L. T. 152, holding that the effect of this clause was to enable the person designated by the will or otherwise entitled to the deceased legatee's interest to be entitled beneficially, but only if he survived the testator, so that in this case the share lapsed. In *Re Bosanquet* (*supra*) there had been no absolute lapse of the gift to the legatee under his will. This was due to the fact that the legatee had made a specific gift under his will of the share which would have passed to him had he survived the testator, and consequently it was held that the specific gift lapsed by the death of the beneficiary in the lifetime of the original testator, though the beneficiary survived the legatee, and the lapsed specific gift passed under the residuary gift in the deceased legatee's will.

It should, however, be noted that these decisions turn upon the precise terms of the proviso to prevent lapse. In the cases cited the proviso, though it refers to survivorship of children of the deceased legatee, does not directly give them any interest. Indeed, in the case under discussion they would not have taken any interest, since the husband would have benefited. It must be observed that in the event of the legatee dying intestate it would not seem probable for there to be complete lapse, because issue living at the death of the testator would almost certainly be some or all of the persons who would be entitled on the intestacy of the deceased legatee, but if a parity of reasoning with the present case is to be adopted, it would seem that if the deceased legatee had left, say, one child only surviving him who had died in the lifetime of the testator, but who left issue surviving the testator, such issue could not take, because the deceased child of the legatee was the person designated otherwise than by the legatee's will to take.

These factors make it very desirable to ensure that the testator's wishes are confined to benefiting the person designated by a legatee who may predecease him. It is thought that more usually the purpose of the testator is to ensure that the issue of a deceased legatee may get the benefit which presumably they might have reaped had their parent survived the testator. In this event it is desirable in the light of these decisions to use an alternative form of proviso which makes a direct gift of the deceased's share to the issue who survive the testator in the familar form.

2. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, Barrister-at-Law.

Unlawful Execution of Writ of Possession—Liability of Landlord and Sheriff's Officers.—In *Williams* v. *Williams and Others* (1937), 81 S. J. 435, a question arose as to a tenant's claim to recover damages against the landlord and the sheriff's officers where a writ of execution had wrongfully been issued. The plaintiff was a controlled sub-tenant. Judgment for possession was obtained by the landlord against the head-tenant, and a writ of *fieri facias* was issued to the sheriff, whose officers executed his warrant and gave the landlord possession. The plaintiff thereupon claimed, amongst other relief, damages for trespass for an illegal execution on the ground that he was a controlled tenant. He brought his action against both the landlord and the sheriff's officers.

The Court of Appeal held that he was not entitled to recover against either. A sheriff's officer is not liable to be sued for executing a judgment, however wrong it may be. The leading authority on this subject is *Howard* v. *Gossett* (1845), 10 Q. B. 359; *Gossett* v. *Howard* (1847), 10 Q. B. 411. In that case Parke, B., delivering the judgment of the Court of Exchequer Chamber, said, at p. 453 : " But writs issued by a superior Court, not appearing to be out of the scope of the jurisdiction, are valid, and of themselves, without any further allegation, a protection to all officers and others in their aid acting under them."

The landlord is protected by the rule that the sheriff's officers in executing the judgment are acting for the Court and are not the landlord's servants or agents. In the absence of any interference on the part of the landlord, he cannot be sued as a wrongdoer : *Wooller* v. *Wright* (1862), 31 L. J. Ex. 513. To render the landlord liable there must be some active intervention on his part, such as would be constituted by causing the sheriff's officers to do something not covered by the writ under which they acted, or requesting them to execute the judgment on property which he was not entitled to enter. The question what will amount to a direction to a sheriff sufficient to render an execution creditor liable for the act of the sheriff was discussed in *Smith* v. *Keal* (1882), 9 Q. B. D. 340, and in *Hewitt* v. *Spiers & Pond, Ltd.* (1896), 13 T. L. R. 64. In *Williams* v. *Williams and Others* there was no evidence of any special direction being given by the landlord to the sheriff's officers such as would make them his agents, and so the claim against the landlord failed also.

Tenancy by Estoppel—Payment of Rent and Possession by Underlessee.—A decision by T. Eastham, K.C., Official Referee, provides an interesting illustration of the law governing tenancy by estoppel.

In *Official Trustee of Charity Lands and Another* v. *Ferriman Trust, Ltd.*, [1937] 3 All E. R. 85, a preliminary issue arose as to whether the defendant company was estopped from denying that it was the assignee of a lease. The company had entered into possession under an underlease for the term of the head lease less three days. Since 1888 the company and its predecessor in title had been in possession and had paid the rent reserved, which was the same both in the head lease and in the underlease, direct to the lessors. The lessors said that they had been induced thereby to believe that the defendant company and its predecessors were assignees of the lease, and so they claimed that the company was estopped from denying that it was an assignee.

The Official Referee held that the defendant company was not estopped from denying that it was an assignee. No doubt it would have been estopped from denying the plaintiffs' title to the land, but that was a question to be kept entirely distinct. There was nothing to show that the defendant company was paying the rent to the lessor as assignee; it was equally consistent with the facts that it was paying the rent as agent for the head lessee, or as underlessee, to prevent the plaintiffs, as head lessors, from distraining. There was no evidence that the defendant company intended the plaintiffs to believe that it was paying the rent as assignee of the head lease, and so no estoppel arose.

Payment of rent and possession are not of themselves sufficient to estop a person from denying that he is a tenant. The conditions upon which an estoppel may arise were well defined by Bowen, L.J., in *Tichborne* v. *Weir* (1892), 67 L. T. 735, where he said: "If a man pays rent to the landlord on the footing of accepting a term and the liabilities under it, and the landlord accepts the rent on those conditions, then such a person might be estopped from denying that he has become tenant to the landlord on those conditions." But in that case there were other circumcumstances showing that the payment of rent by the person in possession was not made as assignee. *Tichborne* v. *Weir* was therefore to some extent analogous to the case under discussion. The cases cited by the plaintiffs in support of the estoppel were clearly distinguishable. To mention two of them, in both *Williams* v. *Heales* (1874), L. R. 9 C. P. 177; 43 L. J. C. P. 80, and *Rodenhurst Estates, Ltd.* v. *W. H. Barnes, Ltd.*, [1936] 2 All E. R. 3; 80 S. J. 405 (already noted in *The Conveyancer*, Vol. 1,

p. 85), the person paying the rent was only entitled to be in possession if he was there as assignee of the lease, and so he was estopped from denying that he had acted, and had represented to the landlord that he was acting, as tenant under the terms of the lease. In neither of those cases was there an alternative explanation of the possession and payment of rent.

Withholding of Consent to Improvement—Whether reasonable or unreasonable.—In *Lambert* v. *F. W. Woolworth & Co., Ltd.*, [1937] 3 All E. R. 195; 53 T. L. R. 837; 157 L. T. 96; 81 S. J. 499, further questions arose over the lessor's refusal of consent to certain "improvements" desired to be made by F. W. Woolworth & Co., Ltd., upon land demised to them.

It will be remembered that in the earlier action of *F. W. Woolworth & Co., Ltd.* v. *Lambert*, [1936] Ch. 415; [1937] Ch. 37, C. A., the Court of Appeal discussed the question what are "improvements" within the meaning of section 19 (2) of the Landlord and Tenant Act, 1927. That case has already been discussed in these Notes of Recent Cases (see *The Conveyancer*, Vol. 1, p. 82). The plaintiffs in the earlier action were lessees of a shop, and having acquired a lease of adjoining land belonging to another owner they desired to "improve" the shop by building operations which would destroy its identity and merge it into a larger composite building extending over the land of both owners. There was a covenant against making any structural alterations in or additions to the demised premises without the previous consent in writing of the lessors. So far as alterations or additions amounting to improvements were concerned, the effect of the Landlord and Tenant Act, 1927, s. 19 (2), was to introduce into that covenant a proviso that such consent was not to be unreasonably withheld. The Court of Appeal held that the plaintiffs had failed, on the evidence, to prove that the demands made by the lessors as a condition of their consent were an unreasonable withholding of consent. The Court went further, however, and discussed the question what are improvements within the meaning of the Act. A majority of the Court of Appeal held that the proposed works were improvements, although they destroyed the identity of the demised premises and merged them into a larger composite building, because they afforded the tenant a more beneficial user of the premises. Greene, L.J., however, in a fully-reasoned dissenting judgment, came to the conclusion that the proposed works could not be described as improvements.

There would have appeared to be good reason for regarding these opinions of the Court of Appeal as merely *obiter dicta*, as the

question whether the proposed alterations were improvements no longer fell to be decided once it was held that there was no evidence of the withholding of consent being unreasonable. In the second action, however, Simonds, J., decided that he was bound by the majority decision of the Court of Appeal as to what are improvements, and therefore following the Court of Appeal he held that the proposed works were improvements.

In *Lambert* v. *F. W. Woolworth & Co., Ltd.*, the second action, the question was whether events which had occurred subsequently to the first action constituted an unreasonable withholding of consent. The lessees had again written to the lessors stating that they were desirous of executing the works, and they offered an undertaking to reinstate the premises upon the determination of the lease and an undertaking to pay all the costs and expenses and to provide security for the performance of the undertaking to reinstate, but they did not offer to pay any compensation for damage to the premises. The lessors declined to give their consent to the execution of the works upon these terms, and they refused to go to arbitration on the amount of compensation or to refer that question to any tribunal. Instead they commenced an action for a declaration that the proposed works were not improvements, that they were breaches of covenants in the lease and that by withholding their licence or consent to the proposed works such licence and consent would not be unreasonably withheld within the meaning of section 19 (2) of the Landlord and Tenant Act, 1927.

Simonds, J., decided, as stated above, that he was bound by the majority opinion of the Court of Appeal upon the question what are improvements within the meaning of the Act, and so he held that the proposed works were improvements. He further held that the works would not be a breach of certain covenants in the lease, apart from the covenant against making alterations or additions without consent, and so the question which fell to be decided was whether the lessors had unreasonably withheld their licence and consent to the improvements.

The criterion adopted by the learned Judge was to ask the question whether the lessors in refusing their consent were acting not arbitrarily or capriciously but prudently in their own self-interest. Having regard to the fact that if the lessors had named a wrong sum as compensation it would have made it possible for the lessees to carry out the works without licence and without any payment of compensation, it was not unreasonable for the lessors to refuse to name any sum at all as compensation. The exact amount of the damage to the reversion was difficult to assess, and so the lessors were entitled to refuse to run the hazard of attempt-

ing to put a price upon it. On the other hand, the offer made by the lessees was clearly inadequate, and the lessors were not acting unreasonably in refusing to give their licence and consent upon those terms.

This decision affords useful light upon the application of section 19 (2) of the Landlord and Tenant Act. That sub-section of section 19 not only provides for the proviso to be implied that consent is not to be unreasonably refused, but also expressly preserves the landlord's right to require a reasonable sum as compensation for damage to the premises demised or neighbouring premises belonging to the landlord; but where, as in *Lambert* v. *F. W. Woolworth & Co., Ltd.*, it is difficult for the landlord to put an exact price upon the damage, he is justified in simply considering the lessee's proposal upon its merits and rejecting it if he is reasonably entitled to do so, viewing the matter prudently from the point of view of his own interest.

Rent Restriction Acts—Amount of rates to be deducted in computing the Net Rent.—The decision of the Court of Appeal (see Vol. 1 of *The Conveyancer*, p. 89) in *Strood Estates Co., Ltd.* v. *Gregory* has now been affirmed by the House of Lords, [1937] 3 All E. R. 656; 53 T. L. R. 973.

It will be remembered that the case turned upon the precise mode by which "net rent" is to be computed for the purpose of the Rent Acts, the dispute being as to the amount which the landlord was permitted by section 2 (1) of the Rent and Mortgage Interest (Restrictions) Act, 1920, to charge as a 40 per cent. increase upon the net rent. "Net rent" is defined by section 12 (1) (c) of that Act as meaning, "where the landlord at the time by reference to which the standard rent is calculated paid the rates chargeable on, or which but for the provisions of any Act would be chargeable on the occupier, the standard rent less the amount of such rates, and in any other case the standard rent". In this case the landlord at the material time paid a compounded rate under the Poor Rate Assessment and Collection Act, 1869, and the Public Health Act, 1875, and he sought to deduct, for the purpose of calculating the net rent, only the amount of the rates so actually paid by him.

The House of Lords has, however, unanimously upheld the judgment of the Court of Appeal that the amount of rates to be deducted in computing the net rent is the full amount of the rates which, but for the provisions of the Acts mentioned above, would have been chargeable on the occupier, and not the amount of the compounded rate actually paid by the landlord.

3. *INCOME TAX CASES.*

By L. J. STEIN, Barrister-at-Law.

[The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Life tenant of residue — payments in respect of period before administration complete.—Before the recent decision of Lawrence, J., in *Corbett* v. *C. I. R.*, [1937] 3 All E. R. 808, there was an element of doubt as to the tax position of a life tenant of residue with regard to sums paid or credited to him in respect of the period between the testator's death and the ascertainment of the residue. Under the rule in *Allhusen* v. *Whittell*, L. R. 4 Eq. 295, a life tenant of residue is entitled, in the final settlement of accounts, to a sum representing his share, as between himself and the remainderman, of the income which accrued during the period of administration. He can, therefore, be said to have an interest in the income relating back to the testator's death. Does it, then, follow that to the extent of that interest the interim income is income of the life tenant so as to form part of his total income for surtax purposes? The position of a residuary legatee, as distinct from a life tenant of residue, is clearly established by the *Barnardo's Homes* case, 7 T. C. 646. The residue does not come into existence until it has been ascertained, and interim income, in so far as it reaches the residuary legatee, reaches him as capital and neither attracts tax in his hands nor is available to him for the purpose of a repayment claim. It has, however, been suggested that the case of the life tenant of residue is distinguishable in that he is entitled to income and nothing else, and that whatever comes to him from the estate must, therefore, necessarily come to him as income. The point arose in the *Marie Celeste* case, 11 T. C. 226, but the facts of that case were such that the decision left room for doubt as to whether it was based on a principle of general application. A definite ruling has now been provided by *Corbett's* case, above, which decides that where a payment is receivable by a life tenant of residue in respect of the period before the residue has been ascertained, that payment reaches him, not as income, but as a sum equal to his share of the interim income, and does not form part of his total income for surtax purposes.

Deduction of tax from rent—finality of General Commissioners' decision.—In *Ecclesiastical Commissioners for England* v. *Sackville Estates, Ltd.*, 16 A. T. C. 175, a question arose as to the extent of the jurisdiction conferred upon the General Commissioners by Rule 22 of the All Schedules Rules. A leased a building to B at a rent of £9,500. On the ground of non-occupation of part of the premises, B obtained relief under section 21 of the Finance Act, 1930, with the result that the Schedule A tax actually payable by B for certain years of assessment was considerably less than the rent of £9,500 payable by B to A. B claimed, nevertheless, to be entitled to deduct tax against A on the full amount of £9,500. B proceeded to refer the difference to the General Commissioners under Rule 22, and the Commissioners (somewhat surprisingly, in view of the language of Rule 4 of No. VIII of Schedule A) decided in his favour. A refused to admit the jurisdiction of the General Commissioners, took no part in the proceedings before them, and brought an action for rent. The language of Rule 22 is not free from ambiguity, but Lawrence, J., held, though—as he stated—with reluctance, that on the true construction of the Rule the dispute as to the amount of the deduction was within the scope of the General Commissioners' jurisdiction, with the result that the jurisdiction of the Court was ousted and the General Commissioners' decision, whether right or wrong, was final.

Public golf course—tax under Schedule B.—Mitcham Common is designated by Statute to be held for the use of the public. The Conservators have statutory powers to set aside part of the Common for playing games. Under a licence granted by the Conservators to the trustees of the Mitcham Golf Course the trustees are authorised to maintain a golf course on a certain portion of the Common. The trustees make a charge of 1s. 6d. per round, but subject to this payment any members of the public are entitled to play. Any profit is required to be applied to the improvement of the course or generally to the upkeep of the common for the benefit of the public. On these facts it was decided in *Trustees of Mitcham Golf Course* v. *Ereaut*, 16 A. T. C. 161, that the trustees were not assessable under Schedule B in respect of the golf course, since they could not be said to be in occupation within the meaning of the Rules of Schedule B. Before exemption from tax was provided by section 34 of the Finance Act, 1921, local authorities were held to be for tax purposes in occupation of their sewers (see, for example, *Ystradyfodwg Sewerage Board* v. *Bearsted*, 5 T. C. 230); but these and

similar cases were distinguished on the ground that there was there an exclusion of the public, whereas the Mitcham Golf Course was, and was by law required to be, open to the public. It made no difference that members of the public could use the course only on payment of the prescribed charge, which was imposed for the purpose of enabling the course to be maintained for the public enjoyment.

Deduction of tax from annual payments—payments in arrear.—The decision of the Court of Appeal in *Taylor* v. *Taylor*, 16 A. T. C. 218, adds one more to the long list of authorities on the application of Rule 19 of the All Schedules Rules with reference to the deduction of tax from annual payments. Under a separation agreement the husband covenanted to make weekly payments to the wife. Arrears having accumulated, the wife sued for the amount due. Such payments as had been made by the husband had been by him made without deduction of tax. The husband now contended that he was entitled to set off against the arrears the amount of the tax which he would have been entitled, but had in fact omitted, to deduct. Rule 19 requires the deduction to be made at the time of payment, and the husband's contention, in the form in which it was advanced, was not maintainable. It appeared, however, that, whereas at one point of time, *viz.*, in August, 1932, there were no payments in arrear, the husband had been at all times in arrear from that date onwards. Accordingly, a line was drawn at August, 1932. As regards sums paid before that date, it was clear that, the payments having been completed and the transaction closed, the right of deduction had been irrevocably lost. There could be no question of bringing into account, by way of set-off against the arrears sued for in the action, the amount of the tax which might have been but had not been deducted from the pre-August, 1932, payments. On the other hand, arrears were now outstanding, and because the husband, in making such payments as had been forthcoming after August, 1932, had omitted to deduct tax, it did not follow that he was not entitled to make the deduction in paying the arrears. So long as there were arrears, the making of the payments had not been completed, and the husband had not lost the right to deduct tax at the rate or rates appropriate to the years to which the underpayments related. Accordingly, the wife got judgment, not for the amount of the arrears, but for that amount less tax.

Reference may be made, in connection with this case, to the decision as to the deduction of tax on payment of arrears in

Re Wooldridge, [1920] W. N. 78, though that decision must be read in the light of the important distinction that it related to a question between trustees and beneficiaries and not between a debtor and a creditor.

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4. *DEATH DUTY CASES.*

By L. J. Stein, Barrister-at-Law.

Estate duty—exemption of settled property on death of party to a marriage where duty paid on death of the other party.—In *Armstrong* v. *Estate Duty Commissioners*, [1937] 3 All E. R. 484, the Privy Council had before it an appeal which, though arising under the law of Hong-Kong, raised a point which bears upon the construction in English law of the group of provisions consisting of section 5 (2) of the Finance Act, 1894, section 13 of the Finance Act, 1898, and proviso (a) to section 14 of the Finance Act, 1914. These provisions relate to the exemption from estate duty of settled property passing, or deemed to pass, on the death of one party to a marriage, where duty has already been paid in respect of the property on the death of the other party. Does this exemption apply in a case in which property is deemed to pass on the cesser of an annuity for which no investments have been appropriated and which has been paid out of, but has not exhausted, the general income of the settled fund? In other words, can the estate duty *primâ facie* payable in these circumstances be said to be in respect of settled property, notwithstanding that on the one hand the annuity did not exhaust the whole income of the settled fund, and that there is, on the other hand, no specific property—no definite part of the settled fund—to which the annuity can be related? This question, as it arose under the law of Hong-Kong, was answered by the Privy Council in the negative. Lord Maugham, in giving judgment, expressly safeguarded himself against being considered to be expressing any opinion on analogous questions which might arise on the parallel provisions of the English Finance Acts. The English authorities were, however, reviewed, and the decision must clearly be taken into account in considering the effect of the corresponding English legislation.

Succession duty—who is the predecessor?—It is unnecessary to describe in detail the somewhat complicated facts in *Re Drake Settlement Trusts*, [1937] 1 All E. R. 286, in order to bring out the real point in dispute, which may be explained as follows: As a result of certain prior transactions, A became in 1915 entitled

to certain properties for a vested estate in fee simple in remainder immediately expectant upon the termination of the life-interest of X, but subject to divestment in the event of A's not surviving the War. If A should not survive the War, the properties would pass to B, subject to X's life interest and subject also to an annuity payable to A's widow. In 1917, A and B, for reasons which are for the present purpose immaterial, entered into an agreement for the settlement of the properties, subject to X's life interest, on certain terms, the main effect of which was that A was to have a life interest and thereafter the properties were limited to the use of A's sons successively in tail male with remainder to B for life and thereafter to the use of B's sons successively in tail male with remainders over. Provision was to be made for an annuity for A's widow and for portions for his children. In the event, A survived the War. The agreement to settle was not given effect until 1921, when a settlement was duly executed on the lines agreed upon in 1917. By this time A, having survived the War, had acquired a vested interest, no longer subject to divestment, expectant on the death of X, and B's contingent interest had ceased to exist. A proceeded to make a will by which he exercised his powers under the settlement to charge the properties with portions for his children. X, the life tenant, died in 1929, and A thereupon acquired an interest in possession. A died in 1933 leaving daughters but no son. B being already dead, the properties passed to B's eldest son as tenant in tail male under the settlement.

On these facts the contest which arose was as to whether, for Succession Duty purposes, the respective successions of B's son and of A's widow and daughters were derived from A as sole predecessor or from A and B as joint predecessors—a question materially affecting the rate at which Succession Duty was payable. It was held by Bennett, J., that though both A and B were parties to the agreement to settle of 1917 and to the settlement of 1921, and though the settlement took the form it did because B was in 1917 in a position to impose his will upon A, yet in the events which had happened the real position was that the person, and the only person, out of whose estate the successors' interests were derived was A, and A must, therefore, be treated as the sole predecessor. The decision is really only an application of the principle laid down by Lord Cranworth in *Att.-Gen.* v. *Floyer*, 9 H. L. C. 477: "We must inquire, not who are the parties by whose conveyance the estate has been created, but who is the conveying party out of whose estate the interest in question has been derived."

CONVEYANCER'S NOTEBOOK.

Tithe annuities—land sold subject thereto.—Attention is called to the memorandum issued by the Tithe Redemption Commissioners pointing out that practitioners have sometimes omitted to furnish the Commissioners with information of a change of ownership under the Tithe Act, 1936, s. 18 (9). This provision requires an owner of an estate or interest in land, in respect of which a tithe annuity is charged, and who disposes of his interest, to furnish particulars of the disposition in the prescribed form within one month of the date of conveyance, transfer, vesting deed, or whatever it may be. Failure to supply this information renders the person responsible liable to a fine on summary conviction of not exceeding £5.

Coal mines—registration of interests.—The proposal by the Government to take steps to acquire nationally the royalty rights in coal mines has led to the establishment of another register of proprietary interests in land. Presumably because coal is regarded as a commercial product and because seemingly the register will be compiled primarily for the purchase by the Government of these interests the Board of Trade undertake this function. The Act does not prescribe compulsory registration but holds out an inducement to take immediate steps by providing that within reasonable limits the costs of the application to register will be defrayed by the Board of Trade if the interest registered can be commercially worked as a coal mine and the application is made within six months from the date to be prescribed (this seems to be August 9, 1937) or the creation of the interest : See Schedule II, Part II. As the Act deals with a very specialised form of right and is likely to be followed next session by legislation concerned with the acquisition of mining royalties, only a short summary is appended for convenience of those likely to be interested in this form of interest.

The register, to be called "the coal holdings register", is to be established by the Board of Trade : section 1 (1). It seems unfortunate that a register relating to interests in land should be established in yet another place, particularly having regard to the

fact that it will be incumbent upon those keeping the register to investigate the title to interests in land. The registered proprietor, and any person authorised by him, or by the High Court, or by rules made by the Board, will alone be entitled to inspect the register and make copies or extracts from the entries : section 1 (7).

Coal is defined as bituminous coal, carmel coal and anthracite, and includes minerals or substances other than coal which are comprised in a lease conferring the right to work and carry away both coal and those minerals or substances : section 3.

The register will contain particulars of the coal and mines of coal, the property and rights which are held in association with such coal and mines (presumably such as wayleaves) and the servitudes, restrictive covenants and other matters subject to which the coal hereditaments are held.

Proprietary interests capable of registration are defined to include any interest in coal hereditaments except (i) an interest arising under a coal mining lease in coal hereditaments comprised therein that are not comprised in any underlease out of that lease; and (ii) an interest arising by virtue of the grant of a right under the Mines (Working Facilities and Support) Act, 1923, as extended by the Mining Industry Act, 1926, s. 13 : section 4. These proprietary interests may be treated as separate units of ownership as described in Schedule I of the Act, which may be summarised as a freehold in possession, a freehold reversion on a mining lease, and a leasehold reversion on a mining lease, and also includes the rights of persons having an equitable interest therein, a rentcharge in possession to take the income incident to the fee simple or term of years, and an interest arising under a lease other than a coal mining interest and the rights preserved under the Law of Property Act, 1922, Schedule XII, relating to land formerly copyhold. In fact it appears to include everything but an actual lease under which the mines are being worked, but the Act does not seem very clear on this point. Nor does it seem clear that this registration relates to coal which is not being worked, or an interest in coal which it is desired to register for the purpose of identification of rights. It is thought that this is intended to be covered by the Act, though it seems harsh to expect the owner of tracts of land to register a possible coal mine of which he may be quite unaware. No doubt this is the occasion of the permissive character of the Act and it is only contemplated that registration will take place when the coal is contemplated being worked and so royalties may become payable, if not actually payable at the present time. This view is rather confirmed by the character of the Forms prescribed by the Regulations.

The details of procedure for registration are given in Schedule II together with the Regulations of the Board of Trade, including forms of application and Statement of Particulars : S. R. & O., 1937, No. 749. Applications or requests are to be made to the Registrar, Coal (Registration of Ownership) Department, Mines Department, 55 Broadway, London, S.W.1, either personally or by post. No doubt in cases of doubt communication with the Department will be able to resolve the difficulty.

The Act applies to Scotland subject to some variations in definition, but not to Northern Ireland nor to any part of the Forest of Dean or of the Hundred of Saint Briavels in the County of Gloucester : section 6.

Reference may be made to the absence of mention of the Land Registration Act, 1926. Under this Act mines and minerals will be specifically referred to where they are severed from surface or where a grant expressly includes them : see L. R. Act, s. 83 (5) (6); L. R. R. 195, 196. Furthermore, any grant of a mining lease by a registered proprietor must be noted on the register in order to give it effect as a grant of a legal interest : see L. R. Act, ss. 18 (1), 21 (1). In these circumstances the registration of such interests in registered land seems pointless and the relation between the Coal (Registration of Ownership) Act and the Land Registration Act represent the not uncommon failure of one Government department to use the information already available in another. No doubt by putting the onus upon the proprietors some labour is saved the Department.

Sale by surviving trustee for sale of undivided shares.—Another correspondent raises a problem of considerable difficulty and some practical importance :—

"By a deed made on May 16, 1927, certain property was conveyed to A and B in fee simple as joint tenants upon trust to sell with power to postpone sale and to stand possessed of the net proceeds and of the rents and profits until sale in trust for themselves in equal shares beneficially.

"A died in 1935 having appointed B and her friend C executors of her will. It is now proposed to sell the property. Can B and C do so as trustees for sale, or can B alone sell as beneficial owner, and is not a further deed or document necessary to pass the legal estate either to B alone or to B and C."

The problems, to which the 1925 legislation has given rise in connection with joint tenancy and undivided shares, are numerous and complicated, and it is hoped that in the not distant future we

shall be able to publish a series of articles thereon. In the meantime it may be convenient to offer some tentative suggestions on this particular point.

There appears to be current a general impression that a sole surviving trustee for sale, other than a trust corporation, cannot make a valid conveyance of the legal estate. This is manifestly erroneous since the ordinary deed of appointment of new trustee containing an express or implied vesting declaration is in effect a conveyance of the legal estate to the two trustees jointly : L. P. Act, s. 9 (1); but it may be said that this operates by statute.

Apart, however, from this it is thought that there is no provision in the whole of the legislation requiring a conveyance to be made by two trustees for sale. In section 27 (2) it is expressly provided that the sub-section (requiring payment of capital money to two trustees) does not, except where capital money arises on a transaction, render it necessary to have more than one trustee. So, for example, if a sole surviving trustee for sale conveys the legal estate to the beneficiaries entitled under the trust in compliance with section 23 of the Law of Property Act this is a perfectly good conveyance of the legal estate.

In the case under discussion, however, B can only make a valid conveyance of the whole legal and beneficial estate as a trustee for sale, unless B is solely beneficially entitled under the will (a point to be taken later). In these circumstances B is clearly excluded because he cannot give a good receipt for the purchase-money under section 27 (2), and, though the section does not say so expressly, it is thought that probably the legal estate would be held not to pass, because he has no power as a trustee to make the conveyance. In order, therefore, that B should make a conveyance without the appointment of a new trustee it is necessary to bring the equities on to the title. It is provided by section 42 (1) that any stipulation in a contract requiring a purchaser of a legal estate to accept a title made with the concurrence of any person entitled to an equitable interest shall be void, if the title can be made discharged from the equitable interest without such concurrence under a trust for sale or the Settled Land Act. Consequently any attempt to force upon a purchaser a title made with the concurrence of B and C as personal representatives of the deceased tenant of an undivided share will be ineffective. No doubt in the majority of cases this would dispose of this aspect of the problem. It is thought, however, that if a purchaser waives his strict rights and is content with such a conveyance he will get a good title. What in fact he does is to buy the whole equitable interest in the property and the trustee transfers the legal estate

to the person who is entitled to call for the legal estate and the conveyance is made by direction of the beneficiaries : section 23. The purchase-money is not paid to the trustee for sale at all and consequently the transaction does not fall within section 27 (2). No doubt it is against the policy of the Acts thus to introduce equities on to the title, but there seems to be no provision which precludes it.

If B were beneficially entitled under the will to A's undivided share the matter would be rather different. Here B and C could assent to the beneficial interest vesting in B, in which circumstances B would become solely beneficially entitled. He does not, thereby, obtain the benefit of the amendment to section 36 of the Law of Property Act, 1925, enabling a sole surviving trustee beneficially entitled of a joint tenancy to sell, because the interest was in undivided shares. At the same time, as he has become solely beneficially entitled, it is suggested that he may be able to make a good title. Once again he receives the purchase-money as a beneficiary and conveys by his own direction under section 23. In order to do this it is necessary to bring the equities on the title and it is thought that section 42 may equally apply here, since it is not within the amendment to section 36. The problem, however, is complicated by the fact that apparently under section 23 he could presumably put an end to the trust for sale by a conveyance to himself or by his direction without appointing a new trustee, and it is difficult to see why purchase-money paid to him in one capacity should affect his power to transfer the legal estate by the direction of a beneficiary in another capacity. The answer probably is that he can only contract to sell the legal estate in respect of estate ownership as a trustee for sale, but this is by no means clear, since as beneficial owner absolutely entitled he can call for the legal estate at any time. In the absence of authority it is impossible to be dogmatic on these points, and it is a little remarkable that they do yet appear to have been tested in the Courts. The problem is one primarily of the capacity to transfer the legal estate and the legislation has treated the matter without direct reference. Herein lies the difficulty.

Reform of the law of contract.—Practitioners usually avoid burdening their minds with consideration of Bills before they become Acts, probably on the two grounds that the Bills may never pass into law and that it is unwise to get preconceived notions concerning the contents of an Act by reading it before amendments have been made. It may seem rather strange, therefore, in a practical journal to find an article devoted to proposals for

new legislation. This appears to be in a different case. The proposals in general go to the root of one of the most important branches of our law and one closely affecting conveyancers. The suggestion that our law of simple contract should be converted into a law of contracts dependent to some extent upon the form of the contract is radical enough. An editorial is not the place to assess the value and wisdom of such change, though it does look like retrogression in the common law. The article here printed is not intended to deal with the general aspect but to put forward some considerations peculiarly affecting conveyancing practitioners in the belief that a considered opinion expressed by the profession might at least avoid some uncertainty in the law in the event of legislation, which is to be expected. Experience has shown that once legislation is really completed amendment and simplification is not easily obtained. The time is now to make representations, and it is hoped that this article will enable practitioners to make representations through the various professional channels open to them, if on perusal they feel that representations should be made. Conveyancing depends for its efficiency upon the certainty of the principles involved. If legislation is to be passed there should be as little doubt as possible upon its application to the multifarious transactions conducted by the conveyancing practitioner.

First Registration of Joint Stock Companies.—We have received the following notice from H.M. Land Registry :—

1. Owing to the increase of applications for the first registration of Joint Stock Companies as proprietors of land, the Chief Land Registrar has introduced a new form of application for the use of solicitors when applying for the first registration of a Company or Corporation.

2. This form is designed to assist solicitors by drawing attention to the special points regarding which information is required by the Registry before the first registration of Companies or Corporations can be effected. If this information is supplied in the first instance on the form of application, the first registration of Companies and Corporations will be greatly facilitated and much subsequent correspondence and delay avoided.

3. Form 1E is for use if the land is freehold, form 2E on the assignment of a lease and form 3E where the Company or Corporation is an original lessee. Supplies can be obtained from H.M. Stationery Office and Law Stationers, price 2d. each or 25 for 3s.